# In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN ERROR,
*v.*
WILLIAM R. MASON AND JOSEPH VANderweide. } No. 642.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.*

## SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

### I.

**The judgment of the court below should not be affirmed on account of insufficient allegations in the indictment.**

It is undoubtedly true that if the indictment were fatally defective in substance—so defective that it would not be cured by a verdict—the court below could have quashed the same in ruling upon the demurrer to the special plea, though no demurrer had been filed to the indictment itself. Indeed, if the indictment were so defective that it charges no offense against the United States, the court below might have quashed the same at any time on its own motion. But this rule does not justify an affirmance by this

court of the judgment below, for the following reasons:

A. THE INDICTMENT IS NOT BEFORE THIS COURT FOR CONSIDERATION.

In the court below a demurrer was filed to the indictment, and at the same time, by agreement of counsel, the special plea in bar was also filed; and to this special plea a demurrer was interposed on behalf of the United States. The questions arising under both demurrers were argued and decided by the court at the same time, but the sufficiency of the indictment was decided under the demurrer filed thereto, while the sufficiency of the plea was determined under the demurrer filed by the United States. (Rec., pp. 64, 65.) There were, in effect, two judgments pronounced, although they were contained in the same entry, one holding that the indictment was sufficient, and the other holding that the special plea was sufficient, and, in the absence of a replication thereto, sustaining the same and striking out those portions of the indictment to which the plea was filed. It was to remove this latter judgment into this court that the writ of error was sued out.

Before the passage of the act of March 2, 1907, although such a judgment may have been erroneous, yet the United States had no method of procuring a correction of the same. On the other hand, however, if an indictment was insufficient and the judgment of the court sustaining the same was erroneous, the defendants could obtain relief after a verdict by the

jury and judgment thereon, if convicted, by prosecuting an appeal therefrom to this court, if the record presented proper questions, or otherwise to the Circuit Court of Appeals. It is clear that said act was passed solely for the benefit of the Government, so as to enable it to obtain relief from erroneous judgments of the character specially mentioned therein, and it was not intended in any respect to change the method of procedure by which defendants could obtain relief from erroneous judgments against them.

This was the view expressed by this court in the case of *United States* v. *Keitel* (No. 286 of the present term), a part of the opinion in which is quoted on pages 7 and 8 of our original brief. That case presented precisely the same condition as here exists. The scope of the argument before this court with reference to the indictment is thus stated in the opinion:

> Finally, we come to the two contentions of the Government which we have hitherto temporarily put aside, and to the various contentions on the part of the defendants in error, insisting that either the court below misconstrued the indictment or that there were such defects in the indictment that it was rightly quashed, irrespective of the construction of the statutes which led the court below to do so. But we do not think we have jurisdiction on this writ of error to consider these questions. (P. 13.)

And immediately thereafter follows the portion of the opinion quoted in our original brief.

The indictment is not, therefore, before this court for consideration, and the principle stated in *Dickson* v. *Wilkinson* (3 How., 61) that—

> although either party may on a demurrer take advantage of any defect or default in pleading in the previous proceedings in the suit, the demurrer can reach no further back than the proceeding remain *in fieri* and *under the control of the court*—

is clearly applicable.

B. THE INDICTMENT CHARGES AN OFFENSE PUNISHABLE UNDER SECTIONS 5508 AND 5509, REVISED STATUTES.

The main contention of the defendants with reference to the sufficiency of the indictment is, that the rights and privileges described therein are not rights and privileges cognizable under section 5508, Revised Statutes, but that the offense is one arising under section 5518, and consequently that the penalty prescribed in section 5509 does not apply.

This contention is based upon the theory that section 5518 supersedes, to the extent of the rights and duties described therein, section 5508, and that the rights and privileges described in the indictment fall *entirely* within the provisions of section 5518.

We insist that the two provisions are entirely consistent with each other, and that the latter section in no respects limits or supersedes the former; but that

if it does, the rights and privileges described in the indictment do not fall within the rights and duties described in section 5518. The latter section is directed solely against a conspiracy to prevent one from accepting and holding an office under the United States and to prevent the performance of the *duties* pertaining to such office, while section 5508 is directed against a conspiracy to injure, oppress, threaten, or intimidate any citizen in the exercise and enjoyment of any *privilege* or *right* secured to him by the Constitution or laws of the United States.

The conspiracy alleged in the indictment was to injure, etc., Walker and others—

> in the free exercise and enjoyment of a right and privilege secured to them and each of them by the Constitution and laws of the United States—

in this, to wit, they were—

> then and there special agents and employees, respectively, of the Department of Justice of the United States, and citizens, officers, and agents of the said United States, and it was then and there a right and privilege and the free exercise thereof secured to them, and each of them, as citizens of the United States, by the Constitution and laws of the United States to investigate, discover, inform of, and report all violations of the laws of the United States and evidence thereof.

It was further alleged—

> That at all times mentioned in this indictment the said Joseph A. Walker, John E.

> Chapson, Thomas J. Callaghan, and Thomas Harper were then and there citizens of the United States and engaged as aforesaid in the exercise of their said right and privilege secured to them by the Constitution and laws of the United States.

In the third count of the indictment, in addition to the right and privilege thus described, was added the following:

> And it was then and there a right and privilege secured to the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan, and Thomas Harper, and each of them, as citizens of the United States, by the Constitution and laws of the United States, to accept such public employment and enter the service of the United States as such officers, agents, and employees, and to engage in the administration of the functions of said public offices and employment, and while so exercising such functions to be secure in their persons from bodily harm, injury, assault, and cruelties.

It can not be doubted that the rights and privileges here described, whether they pertained to the persons mentioned as officers or as citizens of the United States, *were secured by the laws of the United States.* Furthermore, if the performance of a duty as an officer is not a right or privilege within the meaning of section 5508, which we do not admit, the fact that one holds an official position does not, we insist, deprive him of the right and privilege to make the

investigation and give the information described, as a private citizen.

It was held in *In re Quarles* (158 U. S., 532) and in *Motes* v. *United States* (178 U. S., 458) that it was the right and privilege of one, in return for the protection enjoyed under the Constitution and laws of the United States, to aid in the execution of the laws by giving information to the proper authorities of violations of those laws, and that a conspiracy to injure one who had given information about violations of the revenue laws is an offense under section 5508. Certainly the rights of an individual as a citizen are not destroyed because he assumes an office, the duties of which include his rights and privileges as a citizen. For illustration, suppose the parties conspired against in the said cases of *In re Quarles* and *Motes* v. *United States* had been revenue officers, and had given the same information while acting as such officials. Would that fact have rendered the indictment invalid?

Practically the same state of facts would have been presented as were subsequently involved in *Davis* v. *United States* (103 Fed., 457). In that case the indictment was drawn under sections 5508 and 5509, and the citizens mentioned therein as having been conspired against were the marshal and some deputy marshals of the United States for the western district of Tennessee and a posse which the marshal had called to his aid in executing a warrant of arrest issued for a violation of the internal-revenue laws; and the indictment charged the accused, not only with the conspiracy, but also with having, in the

execution thereof, shot and killed one Garner, a deputy marshal. The allegations of the indictment were held to be sufficient (pp. 471, 472). On appeal to the Circuit Court of Appeals, Sixth Circuit, the judgment of the lower court was affirmed (107 U. S., 753); and it was from the opinion rendered therein that this court, in the case of *Rakes* v. *United States* (No. 257 of the present term), quoted with approval the interpretation of sections 5508 and 5509.

The precise question here presented came before Mr. Justice Howell E. Jackson, when circuit judge, in *United States* v. *Patrick* (54 Fed., 338), wherein the conspiracy alleged was against deputy collectors of internal revenue and deputy marshals of the United States; and that learned judge, in the course of his opinion, said:

> In calling upon a citizen to act as its agent or officer in the exercise of a right or privilege secured by its Constitution or laws, the duty of protecting the citizen therein is certainly as great, if not greater, when such right or privilege concerns the Government, representing the entire political community, as when it relates to the individual alone, and rests within his option to exercise or not.

And, after quoting section 5518, said:

> This statute is in perfect harmony with sections 5508 and 5509, and instead of showing that Congress did not intend by said sections to include the case of a citizen in the exercise of a right or privilege appertaining to official station or function it tends strongly in the other direction.

Repeals by implication are never favored, and section 5508 is not superseded by section 5518, unless they are antagonistic, and even then only so far as the latter necessarily conflicts with, or covers the same ground as, the former. Furthermore, it is the prime object in construing statutes to determine the legislative intent; and it is clearly apparent from reading the act of May 31, 1870 (16 Stat., 140, 146), from sections 6 and 7, of which sections 5508 and 5509, Revised Statutes, were taken, and the act of April 20, 1871 (17 Stat., 13, 15), that it was the purpose of Congress to provide for the thorough and efficient enforcement of the amendments to the Constitution brought about by the result of the civil war; and there is no suggestion in the latter statute that it was to supersede or mitigate in the least any punishment that might be inflicted upon any person violating the former one. The purpose of the latter act was clearly to supplement the former and to add to its effectiveness, and not to reduce the seriousness of, or lessen the punishment attached to, any offense that might be committed thereunder.

C. SECTION 5509 APPLIES TO THE STATE OF COLORADO, ALTHOUGH IT WAS ADMITTED TO THE UNION AS A STATE AFTER SAID SECTION WAS ENACTED.

In support of their contention that this section does not apply to any State admitted after its passage, defendants rely upon the case of *United States* v. *Paul* (6 Pet., 140). The statute under consideration in that case was a section of the act of

Congress passed March 3, 1825, for the purpose of creating and defining offenses committed in navy-yards, dockyards, forts, arsenals, and magazines ceded to the United States and over which no State had any jurisdiction; and the third section of said act provided—

> That if any offense shall be committed in any of the places aforesaid, the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to and receive the same punishment as the laws of the State in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offense when committed within the body of any county of such State.

Paul was indicted for burglarizing, breaking, and entering a storehouse at West Point. But the act declaring the crime of burglary in the third degree—that is, breaking into a storehouse not connected with a dwelling house—under which the indictment was drawn, was not passed by the legislature of the State of New York until 1829, four years after the passage of said act of Congress. This court held, without discussing the question, that the act of Congress was "to be limited to the laws of the several States in force at the time of the enactment."

In *United States* v. *Barney* (5 Blatch., 294; Fed. Cases, 1011), Judge Shipman further held that the said act of Congress was limited in its effect to such

dock yards, etc., as had been ceded prior to its passage. The learned judge thought this construction necessary in consequence of the limitation placed upon the act in the *Paul case*, and pointed out some of the singular results that would follow from a contrary construction. While the *Paul case* has been cited by various courts with approval, yet it is manifestly regarded as upon the border, and in no case has a more limited construction been adopted.

But there is a marked and very important distinction between the act then under consideration and the one before the court in this case. Congress was then legislating for certain places which were *wholly* within the jurisdiction of the United States, and was preparing, as it were, a criminal code for these localities; and after specifically defining certain crimes, then in effect by the section construed incorporated into the criminal laws governing each of those places the laws of the State by which it was ceded. There was good reason, therefore, in holding that this act was complete in itself and not subject to modification by the state legislature. This was especially true, since, as above stated, the State had no jurisdiction over the territory for which the act was passed, and its legislation could not of its own force extend thereto.

The conditions to which section 5509 apply, however, are entirely different. Section 5508 is a general law designed to secure the free exercise and enjoyment of all rights and privileges guaranteed by the entire Constitution and all the laws of the United

States. Necessarily, therefore, this section is coextensive with the Constitution and laws of the United States. Now, section 5509 depends upon section 5508 in that no punishment can be inflicted under the latter section except for violating the provisions of the former, and it was the manifest purpose of Congress that when section 5508 should be violated *in a State—a State at the time of the violation*—the offender should suffer the same punishment as that inflicted for a like offense under the local laws.

Furthermore, Congress clearly meant that the offense committed and the punishment therefor should be determined by the state laws *existing at the time the act constituting the offense was done*, and not when the act of Congress was passed. As above stated, this is an act that is not confined to territory which belonged exclusively to the United States, as did the act construed in the *Paul case*, but it extends wherever the Constitution and laws of the Government are in force, *and it was designed to go hand in hand with the laws of the several States.* Colorado has a perfect right at any time to modify its laws with reference to murder, and such change would be applicable to the place where the crime with which the defendants in this case are charged was committed. Not so with New York with reference to West Point. After it had made the cession to the Government, its legislature thereafter had no more authority to pass laws for that place than it had to legislate for the State of Pennsylvania, and it was entirely consistent for one

set of laws to be in force in West Point, which was territory belonging to the Government, and another in the State of New York. Moreover, the language of the act itself shows that such was the intention of Congress. The language is:

> If *in the act of violating* any provision in either of the preceding sections *any other felony or misdemeanor be committed.*

Manifestly meaning that if in the doing of the act prohibited an offense should be committed against the state law *then existing*, the punishment provided for by such state law should be inflicted.

Take the present case for illustration. It is alleged that in violating section 5508 the defendants committed murder. How is it to be determined whether the facts alleged constitute the offense of murder? Certainly not by ascertaining what the laws of the place were in 1870, but what they were when the man was killed. This more clearly appears from the construction placed upon these sections in the case of *Davis* v. *United States* and *Rakes* v. *United States, supra.*

II.

**The common law can not be invoked to determine whether the trial and acquittal in the state court is a bar to this prosecution.**

It was suggested on the hearing that this court can, if it sees proper, adopt a common-law rule in the determination of any question. Such is undoubtedly the case with reference to rules of evidence and methods of procedure, etc., but we respectfully submit that the

principles of the common law can not be invoked for the purpose of placing a limitation upon the power of this court.

In section 5509 it is expressly provided that if in carrying out the conspiracy an offense against a state law be committed, the punishment provided for by the State for such offense shall be imposed by the federal court. This statute is mandatory, and the court must obey its directions unless there is some inhibition greater than the statute, which restrains the court from enforcing it in this particular case. To determine whether or not such inhibition exists, the court can not look to the rules of the common law, but must look solely to the Constitution and statutes of the United States. There is no claim that this statute has been modified by subsequent statutes (leaving out of consideration sec. 5518, R. S.), and, consequently, the Constitution alone must be looked to to determine whether or not such limitation upon the power and duty of this court exists.

For the reasons above set forth and those stated in our original argument, we insist that the judgment of the court below in sustaining the special plea in bar should be reversed.

J. A. FOWLER,
*Assistant Attorney-General.*

MARCH, 1909.

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THE UNITED STATES, Plaintiff in Error,

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Defendants in Error.

Indictment for Conspiracy under Section 5508, and for Murder and False Imprisonment under Section 5509, R. S., U. S.

*Error to the District Court of the United States for the District of Colorado.*

## BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

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## BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

### STATEMENT OF CASE.

The correctness of the judgment of the court below, sustaining the sufficiency of plea in bar to the charge of murder contained in the indictment, is challenged by the pending writ of error.

### ANALYSIS OF INDICTMENT.

The indictment herein contains three counts, each based upon the provisions of sections 5508 and 5509, R. S. U. S., the substance thereof being:

*First Count:* It is here charged that the defendants conspired to "injure, oppress, threaten and intimidate Joseph A. Walker, John E. Chapson, Thomas J. Callaghan and Thomas Harper, respectively, citizens of the United States, in the free exercise and enjoyment of a right and privilege secured to them and each of them by the Constitution and laws of the United States, in this, to wit:"

Then follow statements to the effect that the persons so said to be conspired against were then and there "special agents and employes, respectively, of the Department of Justice of the United States, and citizens, *officers* and agents," and that "*as citizens*" of the United States, the said persons were respectively clothed with the right and privilege, and the free exercise thereof, under its Constitution and laws, "to investigate, discover, inform and report all violations of the laws of the United States, and evidence thereof relative to the fraudulent and unlawful entry of public coal lands and other public lands of the United States, within the district of Colorado," such reports to be made to Marsden C. Burch, special assistant to the attorney general of the United States, and Earl M. Cranston, United States attorney for the district of Colorado.

The count then charges that certain particularly described lands, situate in said district, had theretofore been "unlawfully entered," followed by averments that the said Burch and Cranston were duly authorized and "in *duty bound*" to receive said information and reports from the said named persons alleged to have been conspired against, and to institute either criminal prosecutions or civil suits on behalf of the United States, as the facts might warrant.

Then immediately follow averments that, in pursuance of the alleged conspiracy, and to effect the object thereof, the defendants, on a date named, within the district of Colorado, did unlawfully and feloniously *murder* one of the persons so alleged to have been conspired against, to wit: the said Joseph A. Walker.

The remaining features of the count need not be noticed, as they are wholly unimportant for the purposes of the pending review.

*Second Count:* This count in all essential respects is a duplicate of the first count, save and except that the alleged object of the conspiracy charged was to "injure," etc., Walker, Chapson, Callaghan and Harper "because of their having freely exercised a right and privilege secured to them and each of them by the Constitution and laws of the United States."

The count then proceeds to charge that Walker and his said associates had been and were, during all the times mentioned therein, "special agents and employes, officers and agents of the United States," and that while holding said official positions "*as citizens*" of the United States "they had investigated, discovered, informed of and reported" to the said Burch and the said Cranston "violations of the laws of the United States and evidence thereof, concerning and in the matter of the fraudulent entry of the lands hereinbefore described" (referring to the lands specifically described in both the first and second counts of the indictment).

The count thereupon repeats in all particulars the charge of murder, as set forth in the first count. (Transcript, page 6.)

*Third Count.* This count is, in substance, a restatement in detail of the matters and things set out in the first count, with the sole exception: that after declaring the status of Walker and his associates, as citizens of the United States, and as its special agents, employes and *officers*, it is added:

"And it was then and there their (Walker's, Chapson's, Callaghan's and Harper's) right and duty, by virtue of their *employment*, and they were duly authorized, to investigate, etc., all violations of the laws of the United States." (Transcript, page 8.)

The defendants, in due course, were arrested by virtue of a capias issued upon said indictment, and thereafter, and before pleading to the merits thereof, their counsel entered into a written stipulation with the counsel ofthe United States, to the effect that a demurrer might be filed by the defendants to each count of the indictment, and contemporaneously therewith the defendants should be allowed to file a plea in bar, in the nature of *a plea of former acquittal* to so much and that part of each count as charged the defendants with the said alleged crime of murder, and that the demurrer and plea should

be respectively without prejudice, the one to the other, and that the demurrer and the legal sufficiency of said plea should be heard, argued and submitted at the same time. Such stipulation was entered into and filed in the cause by due leave of court granted and entered of record. (Transcript, page 11.)

In pursuance of such leave and stipulation, the defendants filed a joint and several general and special demurrer to each count of the indictment, eighteen separate and distinct assignments of objections to the sufficiency of said counts, respectively, being set forth in said demurrer. (Transcript, page 12.)

At the same time, a special plea in bar was filed to so much and that part of each of said counts as charged the defendants with the said crime of murder, the vital averments of said plea being that on a date *prior* to the finding of the indictment herein in the federal court for the district of Colorado, the defendants were arrested upon due criminal process issued by the state District Court, sitting within and for the county of La Plata, in the State of Colorado, and which process was based upon due prosecution theretofore begun and pending in said state court, in which prosecution, by information in due form of law, as authorized by the laws of Colorado, the defendants were charged with the commission of the identical murder mentioned and set forth in each of the counts of the indictment to which said plea was addressed.

That the said prosecution upon said charge of murder in said state court was duly continued, from time to time, for a period of several months, and finally came on for trial thereon in said state court before the court and a petit jury, duly chosen, selected, impanelled and sworn to try the issue duly joined in said cause and prosecution between the people of the state of Colorado and the defendants, the latter having duly pleaded not guilty to said charge of murder, prior to the impanelling of said jury.

That thereafter, witnesses were duly called, sworn and examined before said court and jury, both upon the part of the state and the said defendants, touching the question of the guilt or innocence of the defendants of said charge of murder, and that after due trial and hearing, lasting over twelve days, the said jury acquitted the defendants upon said charge of mur-

der by returning a verdict of not guilty; and thereupon, in due course, final judgment of said state court was rendered and entered upon said verdict, discharging the defendants without day, etc.

That all and singular said proceedings in said state court were had and done prior to the arrest of the defendants upon the said indictment in said federal court, and that the said state court and the said jury were vested with full right, lawful authority and jurisdiction to hear, determine and adjudge the question of the guilt or innocence of the defendants of the said charge of murder in the said cause and proceedings in said state court.

That by virtue of the premises, the said federal court could not here retry the defendants upon the said charge of murder, and several provisions of the Constitution of the United States were set forth in support thereof. (Transcript, page 19.)

A general demurrer was interposed to this plea by the United States, which was heard and argued and submitted at the same time that the demurrer of the defendants to the indictment as a whole, and each count thereof, was heard and submitted, and after due consideration by the lower court, the defendant's demurrer to the indictment was overruled and the like disposition was made as to the demurrer of the United States to the sufficiency of the said plea in bar. (Transcript, page 64.)

The United States, having elected to stand by its demurrer to said plea, formal judgment was entered by the District Court of the United States for the District of Colorado in this cause, sustaining the latter pleading, leaving the indictment intact as to the charge of conspiracy contained therein, but discharging the defendants from further prosecution upon the said charge of murder. (Transcript, page 64.) To review this latter judgment, the present writ of error is prosecuted.

## LAW OF THE CASE.

### I.

**Is this court vested with jurisdiction to review the judgment of the lower court sustaining the legal sufficiency of the plea in bar?**

An important jurisdictional question presents itself at the threshold of the pending review, namely: Whether the record at bar discloses a state of facts which clothes this court with power to determine the correctness, or otherwise, of the order of the lower court in overruling the general demurrers of the United States to the plea in bar and the judgment in favor of the defendants in error based upon such order?

The writ of error herein finds its sole support (if authorized at all) by the provisions of the act of March 2, 1907 (34 Stats., 1246), allowing the United States a writ of error in criminal cases under certain prescribed limitations.

That this statute confers a new, special privilege upon the government, hitherto unknown in federal jurisprudence, and is in clear derogation of common law principles, has been expressly decided by this court, in U. S. vs. Sanges, 144 U. S., 310, where, after an exhaustive review of the authorities, it was held that nothing short of an explicit statute, clearly conferring a right of review, could endow the United States with such privilege.

The statute, therefore, assumes to grant to the United States a novel, special prerogative, not shared in by the defendant, and it becomes important to ascertain the rules of construction germane to be applied in determining the scope and extent of the act.

That statutes in derogation of the policy or principles of the common law are always strictly construed is axiomatic in the American system of jurisprudence.

> Lewis Sutherland on Stat. Const., section 573, volume 2.

This court applied the doctrine in Blackfeather vs. U. S., 190 U. S., 368-376, where, in determining the scope of an act

allowing a *civil* suit to be maintained against the United States, it was said:

"Statutes of this nature, extending the right to sue the government, will generally be strictly construed."

If this be true of a statute conferring upon an individual the right to sue the United States *civiliter, a fortiori,* a statute which confers upon the government the right to sue out a writ of error in a criminal case, after judgment in favor of the defendant—a character of legislation which closely approaches an infringement of the constitutional guaranty against double jeopardy (Sanges case, supra, 144 U. S., 315) —should be subject to the rule of strict construction and the defendant given the benefit of any reasonable doubt touching the true purport of the act.

Another cardinal rule of statutory construction can here be properly invoked, viz.:

"In construing all statutes the whole of them must be scrutinized, in order to decide the *meaning of particular parts.*"

Harrison vs. Vose, 9 How., 380.

Many other decisions of this court reiterate this principle in unqualified terms:

Bernier vs. Bernier, 147 U. S., 242, 246.
U. S. vs. Burr, 159 U. S., 84.
Brown vs. Duchesne, 19 How., 183, 194.
Washington, Etc., vs. Hoffman, 101 U. S., 116.

And Wayne, J., in speaking for the court, in U. S. vs. Freeman, 3 How., 557-565, thus lucidly expressed the idea:

"In the construction of statutes, *one* part must be construed by another. In order to test the legislative intention the *whole* statute must be inspected."

Another fundamental rule of statutory construction is *apropos* in the present instance:

"A thing may be within the letter of a statute and not within its meaning."

Smythe vs. Fisk, 23 Wall., 380.

For opinions employing similar language, expressive of same thought, see:

Stewart vs. Kahn, 11 Wall., 493, 504.
Atkins vs. Fibre, Etc., 18 Wall., 272, 304.
Indianapolis vs. Horst, 93 U. S., 291, 300.
U. S. vs. Moore, 95 U. S., 760, 763.
Jones vs. Co., 101 U. S., 622, 626.
Raymond vs. Thomas, 91 U. S., 712, 715.

Now for the application of these bed rock doctrines to the case in hand.

The act of 1907, by virtue of which the United States has removed the case to this court on error, reads:

"Be it enacted, etc., That a writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases in the following instances, to wit:

"From a decision or judgment quashing, setting aside or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the *invalidity* or *construction* of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the *invalidity* or *construction* of the *statute* upon which the indictment is founded.

"From the decision or judgment sustaining a *special* plea in bar when the defendant has not been put in jeopardy.

"The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered, and shall be diligently prosecuted and shall have precedence over all other cases.

"Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: Provided, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

Act March 2, 1907, 34 Stat., 1246.

In the case of U. S. vs. Keitel et al., decided in this court during the present term, involving the construction of the coal land law from a penal standpoint, the court placed a strict con-

struction upon the act, holding in effect that it was only clothed with jurisdiction to review the rulings of the lower court in so far as that tribunal placed a construction upon such law; that the sufficiency of the indictment from the viewpoint of correct pleading was not within the reviewing province of this court.

In the light of the holding in the case last mentioned, and the controlling rules of construction above invoked, does the record herein exhibit a case meet for the exercise of appellate jurisdiction?

The first two clauses of the statute granting a right of review relate to the sustaining of a demurrer or a motion in arrest of judgment "based upon the *invalidity or construction of the statute upon which the indictment is founded.*"

The third clause permits the suing out of a writ of error by the government from "the decision or judgment sustaining a *special* plea in bar." This language is general, but what if any implied limitation should be read into the statute in that connection?

Is not the obvious purpose of congress to limit the reviewing power of this court upon *either* clause of the statute, to cases where the lower court either *expounds* a statute or *declares it invalid*, and the government is dissatisfied with the exposition or annulment?

When the power of review is limited in cases of sustaining demurrers to indictments, to one or the other of the stated grounds, why should not the same limitation apply when a review is sought of a judgment sustaining a plea in bar?

Is it not the manifest purpose of congress in granting the exceptional privilege of a writ of error to the government, in criminal cases, to confine the right of review thereon to the correctness or incorrectness of the ruling of the trial court in the *exposition* of statutes or *declaring them invalid*, whether the action of such court be had upon demurrer to indictment, motion in arrest of judgment or upon plea in bar?

Does the act of 1907 mean that, although when a writ of error thereunder calls in question the ruling of the trial court upon *demurrer* or *motion in arrest* of judgment, this court can

only expound or determine the validity of the statute upon which the indictment is founded, leaving the subject of the construction or interpretation of the indictment, or the sufficiency of its allegations measured by the standard of proper pleading, to the sole arbitrament of the lower court, nevertheless, when a plea in bar is interposed to an indictment and sustained, this court, on error, at the instance of the government, can review the sufficiency of such plea under the general principles and rules of criminal pleading, both as to matters of substance and form, touching such plea, *though no statute was construed by the inferior court, nor any act held invalid in connection with or as the basis of the judgment sustaining such plea?*

The pleas in bar now under consideration did not *per se* call for the construction of any statute; neither did they challenge the validity of any congressional enactment. The demurrer of the United States to the pleas was general in form. No specific ground of attack is mentioned therein, and so far as its language imparts it may have been the intention of the pleader to assail the pleas solely on the ground that some matters of substance were omitted therefrom, leaving them defective under the rules of pleading pertaining to criminal prosecutions.

*No opinion* was filed by the trial court in overruling the demurrers of the government to the pleas. An order was simply entered to that effect, and hence neither the pleas, demurrers thereto, nor action of trial court thereon, raised or involved a question in any form relative to the *construction* or *invalidity* of any statute whatsoever.

To uphold the pending writ of error, thereby conferring jurisdiction upon this tribunal, to entertain the same, it must therefore be held that the act of 1907 means that when a plea in bar to an indictment is sustained, irrespective of the nature of the attack thereon, or ground upon which the trial court acted in that behalf, this court can fully review the ruling below, and upon general principles of criminal pleading, procedure or jurisprudence, affirm or reverse, though no statute is required to be construed, or the validity or invalidity of any enactment is involved.

We submit that the rules of statutory construction heretofore invoked will not warrant so broad an exposition of the act of 1907, and that its true meaning is that the appellate jurisdiction thereby conferred only covers the subject of the construction or validity of some statute or statutes which may be necessarily involved, whether the judgment sought to be reviewed be founded upon demurrer, motion in arrest or plea in bar.

No such condition here existing, we respectfully challenge the jurisdiction of this court to further proceed herein other than to order the dismissal of the writ of error.

Without discussing the point, we will direct the attention of the court to that portion of the act of 1907 which, after allowing a writ or error to the United States, from a judgment or decision sustaining "a *special* plea in bar," limits or conditions the privilege to cases "when the defendant has not been put in jeopardy."

The defendants were "put in jeopardy" in the state court for the identical killing or alleged murder involved in the special pleas, and whether that be the "jeopardy" meant by the act we leave this court to decide.

All that follows in this brief and argument is predicated upon the supposition that this court will hold that it is vested with jurisdiction to review the sufficiency the pleas in bar upon any and all questions and grounds proper to be urged in or considered by the lower court, in that behalf.

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## II.

**Neither count of the indictment charges a violation of section 5508, R. S., hence the court below was without jurisdiction to try the defendants upon the charge of murder. Consequently the United States was not prejudiced by the action of that court in sustaining the sufficiency of the pleas in bar, whether its judgment in that behalf was right or wrong as an abstract proposition.**

Before entering upon the discussion of the merits of the pleas in bar, we desire to present, for the consideration of the court, a preliminary proposition, viz.:

That neither count of the indictment charges facts which would authorize a prosecution for conspiracy under section 5508, R. S. U. S., and that if this contention be sound, the court below could not lawfully take cognizance of the charge of murder to which the pleas in bar were addressed, and hence, no reversible error appears in the record.

The pending prosecution is based upon sections 5508 and 5509, R. S. U. S., the charge of conspiracy to "injure, etc.," being founded upon the former, and the charge of murder upon the latter of said sections. These sections, respectively, read:

"Section 5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States."

"Section 5509. If, in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed."

It is obvious from a bare reading of the foregoing sections that the authority of the federal district court to take cognizance of the charge of *murder* involved herein, is wholly dependent upon the fact that such crime (if committed) was perpetrated in the "act of violating any (some) provision" of section 5508, i. e., that the murder (if any) was committed while defendants were attempting to carry into effect a conspiracy as defined and denounced by *that* section.

This is undeniably true, because no facts are charged in the indictment, and none will be claimed by the prosecution to exist, which would vest any federal court with jurisdiction to try the defendants upon the charge of felonious homicide in

the slaying of the deceased (Walker), unless the killing was the result or outgrowth of an antecedent conspiracy as defined and made punishable by the provisions of said section 5508.

With all possible brevity we will now essay the task of showing that neither count of the indictment charges a conspiracy cognizable under the provisions of the latter section, and if we succeed in such effort, *ex necessitate*, the murder alleged was without the ken of the lower court, and consequently the United States was not prejudiced by nor can it be heard to complain of the judgment under review, wholly irrespective of the sufficiency or insufficiency of the pleas in bar, as an abstract legal proposition.

Lancaster vs. Collins, 115 U. S., 222, and cases cited.

Tubman vs. Railroad Co., 190 U. S., 38.

As section 5507 (the first of the two sections referred to in section 5509) has been held unconstitutional by the Circuit Court of Appeals of the Sixth Circuit, in Lackey vs. U. S., 107 Fed., 114, and as the indictment herein is not based thereon, and the facts charged being wholly without the scope thereof, that section, viz., 5507, may be dismissed from further consideration.

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No Conspiracy Charged Under Section 5508.

In each count of the indictment, the status of the persons conspired against during all of the times covered by the conspiracy, is stated to be "*special agents* and employes respectively of the *Department of Justice*, and citizens, *officers* and agents of the United States."

In each count, the character of services which had been or was about to be performed by the deceased, Walker, and his associates, is stated in these words:

"To investigate, discover, inform of and report all violations of the laws of the United States concerning and in the matter of the fraudulent and unlawful entry of public coal lands and other public lands of the United States within the said district of Colorado."

And the information which might be or which had been secured in the premises, was to be and had been reported to one Marsden M. Burch, Special Assistant to the Attorney General

of the United States, and to Earl M. Cranston, United States District Attorney, for the District of Colorado, to the end that said Burch and Cranston should institute either civil or criminal proceedings, or both, in behalf of the United States, as the supposed facts which had been or might be so reported, would warrant—it being further alleged in each count that the said Burch and Cranston were "in *duty bound* to receive said information, facts and reports from the said Joseph A. Walker, John E. Chapson, Thomas J. Callaghan and Thomas Harper."

The sole object, purpose and motive of the alleged conspiracy, as charged in the indictment, and each count thereof, was to "injure, oppress, threaten and intimidate" the said Walker and his associates, because they had made or were about to make such "investigations and reports."

We freely concede that a conspiracy involving the above stated facts and circumstances would support a prosecution under the provisions of *section 5518*, R. S. U. S., if the indictment was aptly framed thereunder. But such concession is of no avail to the United States, as the prime question now under consideration is, do such facts and circumstances authorize a prosecution under said section 5508?

We assert this question admits of none other than a negative answer.

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## III.

**Section 5508 was not enacted with the view of providing penalties for conspiracies designed to interfere with the discharge of official or quasi-official duties. Its sole purpose was to protect citizens of the United States in the free exercise of rights or privileges pertaining to federal citizenship AS SUCH, and Walker and his associates were not exercising any right or privilege flowing to them MERELY AS CITIZENS, but were discharging official duties.**

For the moment, and for the purposes of the argument about to follow, we will *divest* Walker and his companions *of their attributes or functions as officers* or *agents* of the United States, and *regard* them *simply as citizens* thereof, and will undertake to show that it was neither a right nor privilege, incident to or flowing from their status *as citizens*, to engage in

the work which, it is said by the indictment, they were performing and had performed.

What is that work? The indictment informs us that certain coal lands of the United States had in fact theretofore been "unlawfully entered," and Walker and his comrades are said to have been engaged in making investigations and reports in that behalf.

In what respects the lands described or any of them, had been "unlawfully" entered, the indictment and each count thereof is wholly silent. For aught that appears in said pleading no *crime* had ever been perpetrated against the United States, and none of its *penal* laws had been infringed in the premises.

It is entirely consistent with anything charged in the indictment that the government had suffered a *civil wrong* merely, in connection with such entries, and each of them, the only redress available to the United States, if any, being a civil suit to annul the title acquired pursuant to such entries. To illustrate:

The coal land law allows only "*one*" entry, and not to exceed 160 acres, to any one person. A enters 80 acres of coal land by *one* entry, in one land office, and, at a subsequent time, he makes a second entry of 80 acres in another land office. The second entry in such case is clearly unlawful, being expressly prohibited by section 2350 of the United States Revised Statutes, but no *crime* would thereby be committed.

Or, again, the same person may enter 160 acres of coal land in one land office, and the like quantity afterwards in some other land office. The latter entry in such case would be illegal and fraudulent, but there is no provision of the federal criminal code which would subject the entryman to a *penal* prosecution.

Other instances can be given, but the foregoing will suffice for the purposes of this argument. Tested by the rules of construction applicable to criminal pleadings, the indictment, therefore, merely charges that a *civil* wrong had been perpetrated against the government in connection with the entries referred to. This being the case, is it a right of a citizen of the United States, under its Constitution or laws, to constitute himself a detective or spy and hunt up evidence, to ascertain

the facts and circumstances connected with such entries, the exact nature of the several illegal acts, if any, perpetrated, and the names of the persons involved in the transactions, and the *malafides*, or otherwise, of the person into whose hands the title to the property may have passed, and to make reports of all information which might be thus obtained to the proper officers of the United States, to the end that *civil* suits might be brought in the name of the government, should it finally elect to take such action?

We take the position that *a mere citizen, as such*, has no "right" to officiously engage in any such line of conduct.

No precedent exists recognizing any such supposed general "right" pertaining to citizenship, and the principles and analogies of the law deny its existence.

Can it be successfullly urged that a person, merely by virtue of his citizenship, may legally enforce or invoke judicial protection, based upon an asserted "right" to officiously intermeddle in the affairs of other citizens by engaging in a general business of espionage or spying or eavesdropping, with a view of ascertaining whether the merely *civil* rights of the United States may have been impaired or infringed in the matter of public land entries, to the end that civil suits might thereafter be instituted by the government as a result of the information which might be thus secured and furnished the law officers of the government?

No adjudged case so holds, and the spirit of the common law forbids such character of volunteer, amateur detective work.

There was a criminal offense known to the common law as "Eavesdropping," which is defined in 1 Bishop's Crim. Law (6th Ed.), section 1122, as "hanging about the dwelling house of another, hearing tattle and repeating it, to the disturbance of the neighborhood."

The punishment affixed to this offense was a fine and finding sureties for good behavior. See Bouvier's Law Dict. (Rawle's Rev.), volume 1, title "Eavesdroppers."

Another phase of the offense given in Desty's Am. Crim. Law, section 105e, is:

"Habitually lurking about a dwelling house, and places where persons meet for private intercourse, secretly listening, and then reporting what is said, constitutes the offense."

Substantially like definitions are given in all the text books on criminal law.

While the acts in which Walker and his associates were engaged may not technically be embraced within the definition of eavesdropping as above given, nevertheless, in principle and reason, his conduct, and that of his fellows, *apart from any official rank, station or duty*, amounts in morals, if not in law, to conduct equally vicious and reprehensible.

Is it not, therefore, a legal solecism to urge that such persons, viewed from the standpoint of their status as citizens, had a legal right, secured by the Constitution or laws of the United States, to voluntarily engage in a course of conduct which, to say the least, savors of acts which, under the principles of the common law, would constitute a misdemeanor?

The underlying principle upon which rests that clause of article IV of the amendments to the Constitution of the United States, viz.: the right of the people "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated," renders illegal, general, voluntary, personal investigations of the nature and character set out in the indictment.

This constitutional principle has been enforced under a variety of circumstances.

Thus, it was held in Robinson, et al., vs. Richardson, 13 Gray (Mass.), 454, that a statute of Massachusetts which assumed to authorize assignees of insolvent debtors to search premises by virtue of a *judicial order* in that behalf, with a view of ascertaining the existence of certain designated secret or concealed property, was unconstitutional and in derogation of common right, the court, on page 456, saying:

"Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of *civil* proceedings, or for the maintenance of any mere private right; but their use was confined to cases of *public prosecutions*, instituted and pursued for the *suppression of crime* or the detection and punishment *of criminals*. Even in

those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted, and Lord Camden said that they crept into the law by imperceptible practice."

The court, on page 458, continues:

"The search, therefore, which is thus allowed to be made (by statute) is solely for discovery of *evidence* for the benefit of the party upon whose complaint the warrant is granted, and of which he may desire to avail himself in the prosecution or defense of some other distinct and separate civil suit or proceeding. This is manifestly an unreasonable exercise of power."

The statute was, thereupon, held invalid.

A similar holding in effect was made by the Supreme Court of Illinois, in Lippman vs. People, 175 Ill., 101-112. In that instance a statute of Illinois provided for the issuance of a search warrant under oath of any manufacturer, bottler or dealer in beverages, that he "believed" that a person, in violation of the act (penal statute), "was using or has used upon his premises, any of the plaintiff's bottles, casks," etc.

The court held the statute unenforcible in the absence of an affidavit, specifically charging that a *crime* had *in fact* been *actually* committed, and, in commenting on the constitutional guarantees under consideration, said (page 112):

"The constitutional provisions on this subject had their origin in the abuse of executive authority, and their design is to substitute judicial discretion for arbitrary power, so that the security of the citizen in his property shall not be at the mercy of *individuals* or officers."

The court further said:

"The object of the search warrant is to obtain *evidence*, and, if it is not obtained, that is the end of the prosecution. *Such a search is an unreasonable one.*"

In Cooley's Constitutional Limitations (7th Ed.), page 433, the author sums up upon the subject in hand in these words:

"We think it would generally be safe for the legislature to regard all those searches and seizures 'unreasonable' which have hitherto been unknown to the law, and on that account to abstain from authorizing them, leaving parties and the public to the *accustomed* remedies."

This court, in Boyd vs. U. S., 116 U. S., 630, in referring to the opinion of Lord Camden, already cited, remarked:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the *privacies* of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some *public offense;* it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

In volume 25, A. & E. Ency. of Law (2d Ed.), page 149, it is said:

"A search warrant can not be issued merely upon the ground that a violation of law is expected to be committed, where *no offense* has *actually* been committed; nor can a statute authorize an officer to enter and search a house without warrant and merely upon *suspicion* of wrong-doing."

Adding:

"Searches made upon the complaint or suggestion of one party of the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice in reference to acts or offenses in violation of *penal* laws, are unreasonable and unwarrantable; * * * or where the search is intended merely as a means of *collecting evidence.*"

In Payne vs. Staunton, 55 W. Va., 202-214, the court indulged in the following observations with reference to an application by the plaintiff, to obtain a mandamus, in his capacity as a citizen, to permit an examination and inspection of certain ballot boxes in order to secure evidence of alleged *criminal* frauds committed in the course of the holding of a certain election:

"The only end stated is to gather evidence for criminal prosecution. The grand jury is the medium of that end. It can send for persons and papers, and bring offenders to justice. *Citizens can not meddle* in prosecutions, save in the appointed

modes, by becoming prosecutors or informers *before grand juries or* by recourse to *criminal* process."

We thus perceive that, for the purpose of obtaining *evidence* of the supposed violation of a *criminal* law, a citizen, *as such*, has no right whatsoever to usurp the functions of the public prosecutor or grand jury and constitute himself a general investigator in that behalf.

In Wilmoth vs. Hensel, 151 Pa. St., 200-210, the court thus discusses the functions of a citizen in the respect under consideration:

"He (citizen) was not charged by the law, either with *detecting offenses* or with *bringing offenders* to justice. On the contrary, those *duties* are cast by the law upon its legally constituted officers."

Here, again, is an express authority, denying to Walker and his associates any "right," *as citizens*, to enter upon a general investigation, to ascertain whether the penal laws of the United States had been violated, *much less* to embark upon a wholesale inquiry to disclose whether *civil* wrongs had or had not been practiced against it in connection with the entry of public lands.

If a citizen is not entitled to any character of judicial process to engage in a fishing expedition, in order to collect evidence of the supposed commission of a crime or crimes, then how can it be urged that he has a legal "right" to voluntarily engage in the same character of inquiry and investigation without legal process? The very fact that the law denies him any standing whatsoever in the courts of justice for such purpose, affords a complete demonstration of the absence of any "right" in that behalf under the settled legal definition of such term.

We do not desire to be misunderstood. We freely admit that *if a crime has been actually committed*, and a citizen has casually obtained *actual knowledge* thereof, together with knowledge of the identity of the perpetrator, he has a right—nay, more—it is his duty to communicate such knowledge to the proper officers of the government, to the end that a criminal prosecution may be duly set on foot, this concession, however,

goes to the *extreme limit* of a citizen's right or duty in connection with the bringing of offenders to justice. But such right or duty is separated by a clear line of demarkation from the assumed or asserted right to enter upon a *general investigation*, to ascertain *whether* any crime whatever has been committed, and if so, who the perpetrator thereof may be, much less, to officiously enter upon such character of investigation for the purpose of *unearthing suspected civil wrongs* which may or may not have been theretofore committed against the government in its proprietary capacity as a land owner.

In May's Constitutional History of England, volume 2, chapter 1, page 275, the learned author states:

"Nothing is more revolting to Englishmen than the *espionage* which forms part of the administrative system of continental despotisms."

In Pavesich vs. New England, etc., Co., 122 Ga., 190-213-14, it is said:

"The common law regarded his (individual) person and property as inviolate, and he has the absolute right *to be let alone*."

See, also, Inter. Com. Com. vs. Brimson, et al, 154 U. S., 447, where the court, speaking through Mr. Justice Harlan, quoted with approval the following remarks of Mr. Justice Field, in 32 Fed., 241-250:

"Of all the rights of the citizen few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his *private affairs*, books and papers from the inspection and *scrutiny* of others. Without the enjoyment of this right, all others would lose half their value."

Indeed, it may be truly said that it is contrary to sound public policy to sanction the act of an individual prying into the affairs of a citizen in order to discover whether the latter may or may not have transgressed some legal requirement.

Once recognize the existence of such supposed "right," and it necessarily follows that the business and affairs of an innocent citizen may be subjected to the offensive sleuthing of every

volunteer intermeddler, animated, perchance, by malicious curiosity. Such conduct would naturally arouse resentment upon the part of the person thus shadowed, spied upon and inquired about, and in many instances would inevitably lead to breaches of the peace.

The courts have gone so far as to hold *illegal* contracts entered into by *public* authorities with *private* persons, by which the latter should be paid compensation upon a sliding scale for securing evidence of votes illegally cast at a county election.

Thus, in Gillett vs. Logan County, 67 Ill., 256, the Supreme Court of Illinois considered a contract by which county commissioners employed private detectives to hunt up and secure evidence of votes illegally cast at an election, upon the question of county subscription for railroad stock, the compensation of the detectives to be a certain amount for the first ten illegal votes discovered, double the amount for the next ten, and increasing the pay in like ratio, and held the contract void, saying, on page 261:

"Should contracts of this character receive countenance, we might, among the multiplying forms of agency * * * have to witness the scandalous spectacle of a class of agents holding themselves out to the public as professional procurers of desired testimony," etc.

We think enough has been said on the subject of the alleged "right" of a citizen, *as such*, to officiously enter upon a wholesale scheme of investigating the business and affairs of his neighbors, in order to discover whether they are "above suspicion" as law abiding persons. A *"right" of another is violated, rather than a "right" of the intermeddler exercised, by such line of action.*

Nothing that was said—much less *decided*—by this court in Motes vs. U. S., 178 U. S., 458, or In re Quarles, 158 U. S., 532, militates, in the slightest degree, against the soundness of the foregoing argument, for in each of those cases it affirmatively appeared that a *federal criminal offense had been actually committed*, that the person conspired against in each instance had casually obtained personal knowledge of the commission of the crime, and the perpetrators thereof, and had, in pursuance of his right and duty as a citizen, communicated information to

the proper government officers in the premises. But none of these conditions are present in the case at bar, for here the persons said to have been conspired against are not alleged to have had any actual knowledge of the commission of any *criminal offense* against the United States. Neither is it asserted that *any crime against the laws thereof had in fact been perpetrated.*

What the indictment and each count thereof charges, is solely that Walker and his associates were engaged in making general investigations to *ascertain whether*, as a matter of *fact*, *any law* of the United States, either *civil* or criminal, *had been violated*, to the end that if any information in the premises should be secured, the same might be reported to the attorneys of the government. *The engaging in a general investigation of such character, is neither a right nor a privilege accorded to a citizen of the United States merely as such, by the Constitution or laws of the federal government.*

The duty and correlative right of a citizen to communicate his actual knowledge of an infraction of the *penal* code of the state or nation to the duly constituted authorities, had its genesis in the common law doctrine of misprision of felony, the exposition of which is that "a party is guilty of misprision who stands by the commission of a felony without endeavoring to prevent it, and who knowing of its commission, neglects to prosecute the offender."

Wharton Crim. Law, Section 249 (9th Ed.)

This rule of the common law was not, however, extended to offenses lower in grade than felonies, such as misdemeanors. See Bishop, id., Section 717.

Neither in principle nor by virtue of any precedent extant, is a mere citizen clothed with any "right or privilege" to officiously engage in any *general investigation* to ascertain whether the criminal laws of his country may or may not have been violated, and *a fortiori* is he not clothed with any such right with reference to supposed *civil* wrongs against the government as a property holder.

All the indictment charges, when properly construed, is that Walker and his fellows were engaged in the investigation of the supposed commission of such civil wrongs, and the object

of the conspiracy, it is inferentially alleged, was to impede or interfere with such investigation.

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## IV.

**An express act of congress deprived Walker and his associates of any right merely AS CITIZENS to engage in the course of conduct attributed to them.**

We finally contend that, apart from the principles of the common law, there exists *an express federal statute* which renders it *positively illegal for a citizen to volunteer services of the character set out in the indictment.*

Section 3679, U. S. R. S., as amended by the act of February 27th, 1906, U. S. Comp. Stat. 1901, Supp. 1907, page 691, declares it unlawful, under a prescribed penalty, for government officials to make contracts of employment on behalf of the United States, in excess of the appropriations therefor for the fiscal year, coupling therewith this express prohibition:

"Nor shall *any* department, or *any* officer of the government, *accept voluntary service* for the government, *or employ personal service in excess of that authorized by law*, except in cases of sudden emergency, involving the loss of human life or the destruction of property."

This statutory inhibition absolutely forbids acceptance of "*voluntary service*," *and in addition* prohibits *employment* in the government service, unless there exists congressional legislation authorizing the same.

*As citizens merely*, Walker and his associates *were forbidden by congress to volunteer their services* in the matter of conducting the investigations mentioned in the indictment, and *if* they were *lawfully* employed by the proper authorities of the Goverment, or were *duly* appointed as officers of the United States, and charged with the specific *duty* to make such investigations, then the performance of such official functions was not the exercise by them of a "right," *as* citizens, within the concept of section 5508.

## V.

**The facts set forth in the indictment and each count thereof affirmatively disclosed that the end or object of the alleged conspiracy was not to injure or interfere with the exercise of any right or privilege of the persons conspired against, secured by the Constitution or laws of the United States, to them or either of them, in their capacities as citizens of the United States, but, on the contrary, the entire scope and purpose of such conspiracy was solely to interfere with the discharge of their purely official duties, and hence it is not covered by section 5508.**

The indictment informs us that at the time of the formation of the alleged conspiracy, Walker and his associates were then and there holding *offices* and places of employment under the laws of the United States, as special agents of the federal department of justice, and that the *real* purpose and object of the conspiracy was to injure or intimidate said persons in the performance of the *duties* pertaining to said office or place of employment, and because they had theretofore exercised and discharged such official or quasi-official duties.

These facts stand out in bold relief, and are in no manner disguised or obscured by the verbiage of the indictment wherein it is attempted, by a process of argumentative sophistry, to convert the designed interference with the discharge of purely *official duties*, into a combination to interfere with the free exercise of rights and privileges secured to *citizens* of the United States, *as such*, within the contemplation of such latter mentioned rights and privileges mentioned in section 5508.

These defendants, if in fact guilty of any conspiracy in the premises, should have been aptly charged by due averments of the commission of the crime and conspiracy denounced by section 5518, which fully covers any unlawful conspiracy to interfere with the discharge of *official duties*, or to injure because of performance thereof. The *reason* why the prosecution in the present instance did not attempt to frame the indictment so as to subject the defendants to prosecution under section 5518, but, by a strained and unwarranted construction of the law, attempts to hold them under sections 5508, 5509, is self-evident and requires no comment.

The manifest theory upon which the present prosecution rests, is that, when a person *who may happen to be a citizen* of the United States, is holding an office thereunder, any conspiracy designed to impede him in *the discharge of the duties of such office, or* to injure him in his person or property, for *past performance thereof*, amounts to a conspiracy under the provisions of section 5508 "to injure, etc., any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

This theory is fallacious, and, under the settled principles of construction of penal statutes, is wholly unwarranted for divers sufficient reasons.

The *letter* of section 5508 does not cover the case, because that section is directed exclusively against conspiracies designed to interfere with the exercise of a federal right or privilege, secured to a citizen of the United States, by the laws or Constitution thereof, *by virtue solely of his citizenship*, whereas the case charged discloses that to constitute any right or privilege on the part of Walker and his associates, under any possible construction of said section, said persons must *not only* have been citizens, but, in addition, have been holding and enjoying an additional *special* and conventional privilege, to wit, that of holding an office or occupying "a place of trust or confidence under the laws of the United States."

The indictment therefore charges that the persons conspired against were not only citizens, but *also* officers of the United States, while *section 5508 is applicable only to citizens in their general capacity as such.* From the standpoint of mere citizenship *alone*, said persons were *not exercising* and had not exercised *any right or privilege secured* to them by the Constitution or laws of the United States, *but*, on the contrary, were *discharging duties exacted* of them by law, by virtue of their holding offices or places of trust or confidence under the federal government.

Neither does the *spirit* of section 5508 cover the case.

There is a *broad distinction* between the *rights and privileges incident to mere citizenship, as such*, and the *duties, obligations and functions pertaining to the holding of a public office.* A right or privilege, in the correct sense of those terms, is

something which may be *waived* at the pleasure of the person vested therewith, whereas a public official is bound, under penalty of the law, so long as he holds the office, to *fully discharge its duties*. He has no election whatsoever in the premises. The obligation is mandatory.

Walker and his associates were clothed by virtue of their official or quasi official station with certain limited powers and authority, and charged with a correlative *duty*. Every act to be performed by them in their capacity *as* officers was under the special direction and supervision of the Department of Justice. The place of performance, the nature of the acts to be performed, were all *subject to the direction of their official superiors*, and all power and authority in the premises might be stripped from them at any moment by the appointing power.

How can it be accurately said that a mere function, power or authority, the exercise or enjoyment of which is *solely dependent upon the unlimited discretion and pleasure of the head of a department*, is a right or privilege of a citizen, *as such*, secured by the Constitution or laws of the United States, within the true meaning of section 5508?

Again, the indictment does not charge that Walker and his associates desired to exercise, or ever had exercised, any abstract or implied right, as *mere citizens* of the United States, but, on the contrary, it is patent that what they had done, and what they intended to do, was solely because they were *required and compelled to act* as subordinate officials in the premises, *by the orders and directions of their superior officers*.

The remarks of the Circuit Court in Witty vs. Southern Pac. Co., 76 Fed., 221, are of value in this connection. The court there said:

"While the office of deputy sheriff, perhaps, did not impose upon the plaintiff the duty of making a general search for Sontag (escaped felon), yet, when the specific information was conveyed to him that a felon was at a particular locality within his jurisdiction it was clearly his duty to take prompt measures for the apprehension of such felon, and the law will not now permit him to claim that an arrest thus effected, pursuant to official duty, was made in his *private* capacity as a citizen."

A public officer or person occupying a quasi public position, accurately speaking, possesses no *right* whatsoever as an

officer, save and except such as the law, in express terms, confers upon him. He has *duties* to perform, but his abstract rights are negligible.

In Reed vs. Sehon, 2 Cal. App., 55, 57, it is said:

"Though the word 'office' may be used in varying senses, the term in any *proper* sense implies, as indicated by its etymology, a duty or duties to be performed."

In Shaw vs. City Council, Etc., 131 Ia. 128, 134, the subject of the true nature of the status and functions of an office is learnedly discussed, it being there, inter alia, said:

"It (office) owes its existence to the constitution of civil government, and not to the *personality* of the individual, nor does the right necessarily follow and become an *attribute* of *citizenship*, as we have already pointed out. * * * A public office has in it no element of property, but it is rather a personal, *public trust*, created for the benefit of the state, and not for the benefit of the individual citizens thereof."

In the famous case of Taylor vs. Beckham, 108 Ky., 278, 304, it was held, speaking of the office of governor of the state:

"Such an office is not property, and in determining merely the result of the election, according to its own laws, the state deprives no one of life, liberty or property."

This holding was affirmed by this court, on error, in the same case. See Taylor vs. Beckham, 178 U. S., 548-609, where Chief Justice Fuller, speaking for the court, on page 577, remarked:

"The decisions are numerous to the effect that public offices are mere agencies or trusts, and not property, as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. Nor does the fact that a Constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent change its character or make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a *property* or a *contract* right."

The subject is thus summed up in volume 23, A. & E. Ency. of Law (2d Ed.), 328, as follows:

"It is well settled in the United States that an office is not the property of the officeholder, but is a public trust or agency; that it is not held by contract or grant; that the officer has no *vested right* therein, and that, subject to constitutional restrictions, the office may be vacated or abolished, the duties thereof changed, and the term and compensation increased or diminished."

In Abbott on Municipal Corporations, volume 2, page 607, section 1491, it is said:

"It (holding of public office) is not an *inherent*, a *vested* or a *natural* right."

It must be apparent from these authorities that it is inaccurate to use the term "right" in connection with the discharge of the functions of a public office. The paramount *obligations* imposed upon the officer is the discharge of the *duties* pertaining to the office, and if the term "right" to perform such duties can ever be properly employed in that connection, such character of right is merged in and absorbed by the *obligation* to discharge the duties imposed by law. To our mind it is therefore manifest that congress was not legislating upon the subject of official duties or functions in the enactment of section 5508, and its subsequent legislation, to be hereafter commented on, unmistakably indicates that it did not so intend in the adoption of said section.

The Standard Dictionary, in defining "duty," happily expresses the distinction between such term and the idea embodied in the word "right:"

"It is the creditor's *right* to demand payment, and the debtor's *duty* to pay."

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## VI.

**Section 5518 fully covers conspiracies aimed at the prevention of the discharge of quasi-official duties, such as Walker and his associates had performed and were engaged in performing, thereby removing the conspiracy attempted to be charged from the operation of section 5508, even though such character of conspiracy might otherwise be cognizable under section 5508.**

Section 5508 was originally enacted May 31, 1870, as a part of the reconstruction legislation, primarily designed to

protect the then recently enfranchised negroes in the free enjoyment of their civil and political rights, secured to them by the provisions of the 13th and 14th amendments to the Constitution.

Section 5518, in its present form, was originally enacted April 20, 1871 (17 Stats. at Large, page 13). The portions of this section, material to the present discussion, read:

"If two or more persons in any state or *territory* conspire to prevent, by force, intimidation or threat, any person from accepting or holding any *office, trust or place of confidence* under the United States, or from *discharging any duties thereof*, or to induce, by like means, any officer of the United States to leave any state, district or place where his duties, as an officer, are required to be performed, or to *injure him* in his person or property, *on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof* * * * each of such persons shall be punished by a fine of not less than $500.00 nor more than $5,000.00, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

That Walker and his associates, *while holding* the place or position mentioned in the indictment, were fully covered by this last cited section, and that an indictment, *aptly* framed, would have charged a conspiracy thereunder, if the object of the conspiracy was either to prevent the discharge of their official or quasi-official duties, or to injure them on account of the past discharge thereof, is manifest, not only from the phraseology of the indictment, but, also, from the principles of law clearly applicable to the situation.

In each count of the indictment said persons are directly and specifically alleged, during all the times mentioned therein, as then and there to have been holding the position of "special agents and employes, *officers* and agents" of the United States, and under the direction of the Department of Justice.

We thus find the indictment in terms asserts that said named persons, and each of them, were at all of the times in question "officers" of the United States, and hence it does not now lie in the mouth of the prosecution to dispute the existence of such official rank and station.

But even if the court should reject the specific allegations of the indictment in that behalf, nevertheless the facts pleaded clearly bring said persons within the scope and purview of section 5518.

They at least held a "place of confidence" under the United States, whether they should be technically regarded as officers in the strict sense of the latter term or not.

The term "place" is thus defined by the Standard Dictionary:

"Place—An office, *appointment* or *employment*."

See Century Dictionary for like definition.

The terms "confidence" and "confidential" are thus defined by the Standard Dictionary:

"Confidential—Having private or secret relations with another; trusted; intimate.

"Confidence—A confidential communication; secret."

These definitions were adopted as a correct statement of such terms from a legal standpoint by the Supreme Court of New York in People vs. Gardiner, 53 N. Y. S., 453.

Under these definitions, and no authority is in conflict therewith, it is too clear to admit of legitimate debate, that Walker and his associates were holding "places of confidence" under the United States within the meaning of those terms as employed in section 5518.

Their duties and functions, by virtue of their position, were to make secret investigations, and secret and confidential reports to the Department of Justice, to the end that the latter might thereby determine whether the laws of the United States, either civil or criminal, had been violated, and to institute such character of judicial proceedings as might seem appropriate in the premises.

In the very nature of things, the Department of Justice would have to wholly rely upon and be guided by the information which might be thus secured and furnished it by Walker and his co-agents or officials, and therefore, both within the letter and spirit of section 5518, said persons were holding "places of *confidence*," as well as trust, under the laws of the United States. Moreover, the federal courts have frequently

recognized special agents, such as Walker and his companions, *as officials or quasi-officials* under the United States.

In the late case of Prosser vs. Finn, 208 U. S., 67, 73, Mr. Justice Harlan, speaking for the court, said:

"It is not clear, from any document or decision to which our attention has been called, what is the scope of the duties of *a special agent of the land office*, but the existence of that *office* or position has long been recognized. Suffice it to say that they have *official* connection with the general land office, and are under its supervision and control, with respect to the administration of the public lands."

See, also, U. S. vs. Teller, 106 Fed., 447, where special agents, holding a position similar in all legal aspects to that held by Walker and his associates, were distinctly recognized as agents or *official* representatives of the United States, and lawfully discharging the duties thereof pursuant to the laws of the United States.

To the same effect is Teller vs. U. S., 117 Fed., 577, decided by the Circuit Court of Appeals of the 8th circuit.

And finally the question, who are to be regarded as "officers of the United States," is summed up in the statement contained in U. S. vs. McCrory, decided by the Circuit Court of Appeals of the 5th circuit, and reported in 91 Fed., 296, where it is said:

"An examination of these cases (numerous cited decisions of the Supreme Court of the United States), all bearing on the question in hand, will show that, in the opinion of the Supreme Court, where a person is appointed under authority of law by the head of a department, and his duties are continuing and permanent and his emolument fixed, such person is an *officer* of the United States, and that *within the constitutional meaning of the term.*"

The words, "continuing and permanent," as used in the above quoted excerpt, can, of course, only mean continuing and permanent until removed from office by due authority; because, outside of the judges of the courts of the United States, no federal officer is vested with a life tenure in his official station. And, in the case last cited, a *letter carrier* was held to be an officer of the United States within the definition above given.

## VII.

**Conceding, arguendo, that the generality of the terms employed in section 5508 might include conspiracies designed to interfere with the discharge or to injure or oppress on account of the discharge of federal official duties, IF NO OTHER LEGISLATION appeared on the statute books in that behalf, nevertheless the effect of section 5518 is to SUPERSEDE OR WITHDRAW from section 5508 all conspiracies the object of which is to interfere with the exercise of official functions.**

Let us admit, for the sake of argument, that if no other federal penal statute on the subject of conspiracy existed, save section 5508, its terms might, by judicial construction, be held broad enough to include a conspiracy whose intent and object was to prevent the discharge of federal official duties or to injure or oppress on account of such discharge.

We will now contend for, and offer authorities in support of, the proposition that the legal effect of section 5518, as well as the real intention of congress in that behalf, was to make conspiracies of the character sought to be set forth in the indictment, and each count thereof, cognizable and punishable *solely* under the provisions of the last named section.

Section 5508 was originally enacted on the 31st day of May, 1870, and section 5509, in aid of and auxiliary to section 5508, was enacted at the same time and by the same statute.

The mischief which was aimed at by these two sections was to prevent white citizens in the southern states from interfering with the federal, civil and political rights of the recently emancipated negroes. An examination of the decisions of this court, giving the history and purposes of this legislation, fully bears out this contention. While the language of these two sections is broad enough to include citizens of the United States, of whatever race or color, nevertheless, the real intention of congress and the purpose designed to be accomplished was primarily and principally the protection of the negro race in the southern states from unlawful oppression by white citizens.

It was never specifically aimed at or intended for the protection of *federal officers as such*.

Section 5518, in its present form, was enacted the year following the going into effect of sections 5508 and 5509, viz., on

April 20, 1871. That section, by its terms, is confined to *a special, particular subject-matter*, to wit, the protection of *federal officers* and the punishment of conspiracies, the object of which is the interference with the discharging of official duties, or to injure or oppress because of the previous discharge thereof.

In the light of all the legislation now under general discussion, we feel justified in making the assertion broadly, that congress was of the opinion when it passed section 5518 in 1871, that *the offense of conspiring against federal officials, as such, was not covered by or included within the terms of sections 5508 and 5509, or any other federal statute*, and *to supply this omission* in federal penal legislation, section 5518, in its present form, was then enacted into a law.

This affords an additional argument why section 5508 ought not, as an original proposition, be construed to cover conspiracies aimed at interference with federal official functions.

But let it be conceded that section 5508, *standing alone*, without any further penal legislation, might be judicially regarded as broad enough, by force of its general terms, to include conspiracies aimed at federal officers, as well as those directed against federal citizens as such; nevertheless, in legal contemplation, the force and effect of section 5518 is to supersede or replace section 5508, in so far as it relates to conspiracies directed against federal official action.

Let it be taken for granted that section *5508 is a general section or general law*, covering every conceivable character of conspiracies against federal citizens, whether such citizens be officers or not, and whether the thing conspired to be accomplished was the prevention or interference with the discharge of official duties, or the exercise by citizens, as such, of rights or privileges incident to and existing as an attribute of federal citizenship.

*Section 5518 is, however, a subsequent law, and is a special, particular enactment, aimed at conspiracies against federal officials or those holding quasi-official positions as such.*

The legal result of section 5518 is that, while section 5508, if standing alone, *might* suffice to include the identical conspi-

racies provided for in section 5518, yet the moment the last mentioned section came into existence, it being *special* and covering a *particular* class of cases, which might otherwise be included within the provisions of section 5508, it became inapplicable to the conspiracies specifically provided for in section 5518. The latter section is therefore the only penal law governing the particular class of conspiracies provided for therein.

Let the authorities now speak for themselves, and settle the question whether the proposition above advanced is sound.

In U. S. vs. Chase, 135 U. S., 260, the general principle now under review was recognized and enforced in the following terms:

"It is an old and familiar rule that 'where there is in the *same statute* a *particular* enactment, and also a general one, which in its most comprehensive sense would include what is embraced in the former, the *particular* enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the *particular* enactment.'" (Citing cases.)

The opinion then continues:

"This rule applies wherever an act contains general provisions, and also special ones, upon a subject which, standing alone, the general provisions would include."

The rule, as thus stated by this court, makes the doctrine for which we here contend applicable, whether the general and special provision be included in the *same* statute, or the general provision be included in a prior statute and the special provision be found in a later one.

In a limited and special sense, sections 5508 and 5509 and 5518 may be said to be contained in the same statute, for the reason that the present Revised Statutes (2d Ed.) of the United States were enacted as one law on June 22, 1874.

In this view of the law, sections 5508 and 5509 may be treated as earlier sections of the same law, in which the subsequent section, 5518, appears.

The decision of this court, just cited, holds that everything embraced within the purview of section 5518 is *exclusive and operative*, even though, without it, the subject-matter thereof

might be held to be covered by the general terms employed in section 5508. Other authorities will be called to the attention of the court in support of the particular proposition now under consideration.

In U. S. vs. Jackson, 143 Fed., 783-7, the Circuit Court of Appeals of the Ninth circuit adopted with approval the language of Mr. Justice Brewer in Long vs. Culp, 14 Kansas, 412-414, where it was said:

"It is also a rule of construction that when one section of a statute treats *specially* and *solely* of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto. Not because one section has more force as a legislative enactment than another, but because the legislative mind having been, in the one section, directed to this matter, must be presumed to have there expressed its intention thereon rather than in other sections where its attention was turned to other things."

In U. S. vs. Claflin, 97 U. S., 551, the subject in hand is thus treated:

"In Michell vs. Brown (1 El. & El., 267), it was ruled in the Court of Queen's Bench that if a *later* statute again describes an offense created by a former statute, and affixes a different punishment to it, varying the procedure, etc., the later operate by way of substitution, not cumulatively, and the former statute is repealed. A similar rule was asserted by Baron Bramwell in Ex Parte Baker, 2 H. & N., 219. So in Barry vs. The Croyden Gas Co. (15 C. B., n. s., 568), an act imposing a penalty of £200 upon the undertaker of any gas works for fouling any stream, etc., to be recovered by the person into whose water the foul substance should be conveyed, was held to repeal by implication a former act describing the same offense and imposing the same penalty, to be sued for by any common informer. The two penalties were held not to be cumulative. *The principle of these rulings has been frequently recognized by courts in this country.*"

It will be observed that the rule was there enforced upon additional reasons to those given in the cases previously cited.

The punishment provided by section 5508 is *both* fine *and* imprisonment, the maximum fine being $5,000, the maximum imprisonment being ten years, an additional penalty being imposed by declaring the offender forever ineligible to the holding

of any office or place of honor, profit or trust created by the Constitution or laws of the United States, while the penalty prescribed by section 5518 is simply either fine *or* imprisonment, the maximum fine being $5,000, and the maximum imprisonment being six years, the court being also vested with the discretion to both fine and imprisonment.

We thus discover that both the quantum and character of punishment are different in the one section as compared with the other.

The earlier section required both fine *and* imprisonment, and the maximum of the period of imprisonment there provided largely exceeds the maximum imprisonment authorized by the later section, viz., 5518.

Moreover, the earlier section provides an entirely different character of punishment from that prescribed by the later section, viz., total ineligibility to the holding of any place of honor, profit or trust under the United States.

Again, a still greater and more severe punishment may be inflicted in a prosecution under section 5508 than is permissible under 5518. That is to say: if any collateral crime be committed by the conspirators in the commission or in the carrying out of conspiracies denounced by section 5508, then, under the provisions of section 5509, an additional and cumulative punishment may be inflicted for the perpetration of the collateral offense, to the extent that the latter may be made punishable by the laws of the state wherein the offense is committed.

This means that in a given case it is entirely possible, under the provisions of sections 5508, 5509, to imprison a defendant convicted thereunder for *life*, whereas, under section 5518, the extreme imprisonment penalty that may be imposed can not exceed a period of *six years*.

In principle and reason, it would seem unnecessary to cite authorities in support of the proposition that the law does not contemplate that there can be in existence at one and the same moment of time two separate and distinct statutes, defining the identical offense, one statute providing an entirely different character and quantum of punishment for such offense than is prescribed in the other.

Did no authorities exist, the proposition would be self-evident, that the fundamental principles of law would not tolerate the idea that the government would have the election to prosecute under the one statute or the other, accordingly as the prosecuting officer desired to be lenient or severe toward the defendants in the particular case. The very statement of the proposition carries with it its refutation. But to make assurance doubly sure, we will further cite adjudged cases in that behalf.

In Endlich on Interpretation of Statutes, page 288, the text reads:

"Where there are in an act specific provisions relating to a particular subject, they must govern in respect to that subject as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate."

To the same effect, see Lewis Sutherland on Statutory Construction, volume 2, page 919, and section 275, volume 1, id., wherein the text reads:

"Where there are in one act, or several contemporaneously passed, specific provisions relating to a particular subject, they will govern in respect to that subject as against general provisions contained in the same acts.

"It seems to be immaterial which statute is first enacted. If the *special* statute is *later*, the enactment operates necessarily to restrict the effect of the *general* act from which it differs."

And on page 484, volume 1, id., it is said:

"A statute providing for or defining an offense created by a *previous* statute, and providing a materially different punishment, *repeals* the former act."

In Black on Interpretation of Laws, page 114, the text reads:

"So, where there are two statutes imposing a penalty for the same offense, and the penalty imposed by the one is not the same as that imposed by the other, the later statute *repeals* the earlier, *for the intention to inflict two punishments for the same offense is not to be imputed to the legislature.*"

In Chamberlain vs. State, 50 Ark., 132, 137, the Supreme Court of Arkansas said:

"The more specific provision controls the general, without regard to their order and dates. The two acts are interpreted as operating together, the specific provisions furnishing exceptions and qualifications to the general rule." (Citing Sedgwick Stat. Const., 2d Ed., 97, and cases cited.)

In Lawyer vs. Carpenter, 80 Ark., 411, 413, the opinion states:

"A general law does not apply, where there is another statute governing the *particular* subject, irrespective of the date of either the general or particular law. * * * The particular legislation covers the narrower field where it is applicable." (Citing many cases.)

See, also, Thomas vs. Evans, 73 O. St., 140, 145-146, where it was said:

"There being specific provisions relating to a *particular* subject, they must govern in respect to that subject, although the words of the *earlier* general law, standing *alone*, would be broad enough to include the subject to which the more particular provisions relate. In other words, the later statute creates an *exception* to the other more general provision. The rule here relied upon is so well established, and has been so often recognized by this court, that authorities seem superfluous; yet we cite Endlich on Int. of Stats., section 216; Bishop on Written Laws, section 112a; London, etc., Ry. Co. vs. Wandsworth, Law. Rep., 8 C. P., 185; 109 U. S., 504; 36 Ohio St., 326 (including several other cases.)"

For other authorities in point, see

Ackerman vs. Green, 201 Mo., 231, 244.

U. S. vs. Murphy, 3 Wall. 649-54 (to be read in connection with U. S. vs. Scott, 3 Wall., 642-9).

The citation of further authorities would be superfluous. If any rule of law can be said to be settled, beyond the peradventure of a doubt, it is (as applied to the case in hand) that even though section 5508, standing alone, would suffice to uphold the present prosecution, nevertheless, the provisions of section 5518, being special and peculiarly applicable to the particular state of facts disclosed by the indictment, this last mentioned section controls, and section 5508, by virtue thereof, becomes wholly inapplicable.

In this connection, we desire to call the attention of the court to U. S. vs. Johnson, 26 Fed., 684. That case was a prosecution for conspiracy under section 5518. The facts were, that a conspiracy was entered into to injure and hinder a certain deputy collector of internal revenue in the performance of his duties, the acts charged to have been committed in pursuance of the conspiracy being a felonious assault upon the collector and a posse summoned by him to enable him to discharge his official duties.

Substantially the conspiracy there charged was, in its legal essence, the same character of conspiracy *attempted* to be charged in the present instance, and the prosecution was conducted and a conviction had under section 5518, the court saying, in its charge to the jury:

"The court charges you if the defendant, with others, conspired to injure him (deputy collector) by force, or threaten him or intimidate him, *on account of the discharge of his duty*, or to prevent him from its further discharge, he would be obnoxious to the provisions of this statute." (Section 5518.)

Under the rule of law already adequately discussed, if the conspirators in that instance were properly subject to prosecution under section 5518, they could not be lawfully prosecuted under section 5508. Yet we discover the prosecuting officer, in the present instance, contending that when a conspiracy was formed to interfere with the discharge of federal official duties, or on account of such duties having been discharged, the prosecution therefor may be conducted and conviction had under section 5508, provided the officers conspired against *happened* to be citizens of the United States.

One other thought, worthy of consideration, is here apropos. *Assuming* section 5508 originally covered conspiracies against *federal citizens*, even though the conspiracy might be aimed at interference with official duties, that section was *narrower* than section 5518, with reference to *federal officers*.

Thus, under section 5508, a conspiracy against federal officers could not have been maintained, unless they *chanced* to be federal *citizens*, while under section 5518 a conspiracy to interfere with discharge of federal official duties is made penal whether the officers conspired against be *citizens or aliens*.

Federal officers are, therefore, no longer (if they ever were) within the protection of section 5508, while, under section 5518, *alien*, as well as citizen, federal officers are protected.

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## VIII.

**Section 5509, R. S. U. S., is not now and never has been operative in Colorado, and therefore federal courts sitting within the district of Colorado have no jurisdiction of any offense whatsoever thereunder.**

We now squarely challenge the *jurisdiction* of the lower court to take cognizance of either the charge of murder or false imprisonment contained in each of the counts of the indictment herein, upon the broad ground that *section 5509*, under and by virtue of which such charges are incorporated in that pleading, *is not now, and never has been, operative within the borders of the district or state of Colorado*, and when such charges of murder and false imprisonment are eliminated from said counts respectively, there are not sufficient specific averments left in the indictment to adequately charge a conspiracy under section 5508, standing alone. Therefore, upon the ground of want of jurisdiction, this entire prosecution must fall.

The premises upon which the claim of want of jurisdiction are based may, at first blush, seem startling, as they are certainly novel. Nevertheless, the language of the section, taken in connection with the decisions of the federal courts, including this court, upon directly analogous legislation, will demonstrate that the proposition is sound and impregnable.

As already stated, section 5509, in its present form, was originally enacted May 31, 1870, and it may be said to have been re-enacted on June 22, 1874, that being the date of the adoption by congress of the present revision of the federal statutes, as the general laws of the United States.

The very latest date, therefore, when section 5509 can be said to have been enacted in any form or manner by congress, was on the date last named, and not afterwards.

We will now quote the section in full. It is short.

"If, in the act of violating any provision in either of the two preceding sections (5507 and 5508), any *other* felony or

misdemeanor be committed, the offender shall be punished for the *same* with such punishment as *is* attached to such felony or misdemeanor by the laws of the *state* in which the offense is committed."

It will be observed that this section does not attempt to define what shall constitute "any *other* felony or misdemeanor." But what is accomplished by the section is the adoption thereby of the penal laws of the *state*, as such laws existed *when* section 5509 went into effect, both for the purpose of defining the "other felony or misdemeanor," as well as prescribing the punishment attached thereto.

Therefore, in every prosecution under section 5509, it is indispensable for the government to point out some specific criminal law of the *state*, defining the "*other*" crime falling within the purview of section 5509, and the power of the court to punish for such "other" crime is to be measured by the laws of the *state* in that behalf.

The federal judicial holdings under a statute of like character with that of section 5509 announce, as a settled rule, that the effect of the section was, in legal contemplation, to incorporate therein the entire criminal Code of each state, *as such Code existed when the section became a law*.

In other words, the "other felony or misdemeanor" referred to in section 5509 is not another felony or another misdemeanor which may be created or made punishable by a statute enacted by the *state after* section 5509 went into effect. The reason of this rule is manifest.

If the definition of the "other" offense should be left to *subsequent state legislation, and the punishment therefor be subject to changes or alterations* which might be made by the state legislature, *after* the section became a law, this would be tantamount to an attempted delegation by congress to a state legislature to define what should constitute a crime against the United States, and the nature and extent of the punishment to be inflicted therefor. *Such legislation would be unconstitutional, if attempted.*

Therefore, to sustain the jurisdiction of the trial court under section 5509, it is indispensable to establish two propositions:

First: That the geographical area comprised within the present district of Colorado *was a state* when section 5509 was last enacted.

Second: That the acts which constituted the crime of murder, as well as the crime of false imprisonment, *when* section 5509 so became a law must contemporaneously therewith have been specifically defined by a *then existing statute of the state* of Colorado, and the punishment likewise prescribed for the commission thereof. Neither of these essential conditions under any possible construction were in existence in 1874, when section 5509, for the *last time*, was enacted and became a law. We will now cite the authorities in that behalf:

The first case, involving the main point now under discussion, to which we will call the attention of the court, is that of U. S. vs. Paul, 6 Peters, 141, the court then having under consideration the third section of the act of 1825, which reads:

"That if any offense shall be committed in any of the places aforesaid (referring to forts and other public places, the sites to which had been ceded to the United States), the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to and *receive the same punishment as the laws of the state in which such fort, etc., is situated, provided for the like offense when committed within the body of any county of such state.*"

The language of the section thus quoted would, if anything, seem to imply the future, rather than the present tense, as compared with the language employed in section 5509. Nevertheless, Chief Justice Marshall, speaking for the court, expressly held that *that section adopted the state statutes in effect at the time when the act of congress was passed, and must be so limited.*

The same question came before the Circuit Court of Appeals of the Eighth Circuit, in the recent case of Hollister vs. U. S., 145 Fed., 773. The court there had under consideration the effect of the congressional act of February 2, 1903, under which congress conferred jurisdiction upon the Circuit and District Courts of the district of South Dakota to try divers criminal offenses, among others, that of larceny which might be com-

mitted by any person within the limits of any Indian reservation within that state.

This legislation was based upon an express reservation contained in the enabling act, authorizing the admission of South Dakota into the Union, to the effect that congress should retain absolute jurisdiction over all territory included within Indian reservations in said state until the Indian title thereto should be extinguished, thus withdrawing the territory embraced within Indian reservations from state jurisdiction.

The act of 1903, after giving the federal courts jurisdiction of the offenses named, provided for punishment thereof in the following language:

"Shall be subject to the same penalties and punishments as are all other persons convicted of either of said crimes under the laws of the state of South Dakota."

Judge Adams, in delivering the opinion of the Court of Appeals, on page 779 (145 Fed. Rep.), after quoting the provisions of the said third section of the act of 1825, proceeded to say:

"That court (Supreme Court of United States), by Chief Justice Marshall, held that that section adopted the punishment provided for by state statutes, *in effect at the time the act of congress was passed*, and must be so limited. That decision has been accepted as the law from that day to this. The act of February 2, 1903, supra, is not inconsistent with the rule so announced. It employs the present tense in referring to the punishments provided by the laws of South Dakota, which it adopts. The language is:

"'Shall be subject to the same penalties and punishments as are all other persons convicted of either of said crimes under the laws of the state of South Dakota.'

"It does not purport to delegate to the state of South Dakota authority at any time *in the future* to fix, *ad libitum*, the punishment of federal offenses. *This it could not do.*"

In Kendall vs. U. S., 12 Peters, 524-625, the principle here under consideration was thus expounded:

"It was not an uncommon course of legislation in the states at an early day to adopt, by reference, British statutes, and this has been the course of legislation by congress in many instances where *state practice* and state process has been adopted. And such adoption has always been considered as referring to the law *existing* at the *time of adoption*, and no subsequent legisla-

tion has ever been supposed to affect it. And such must necessarily be the effect and operation of such adoption. No other rule would furnish any certainty as to what was the law, and would be adopting prospectively all changes that might be made in the law."

In the case of In re Heath, 144 U. S., 92, this court again announced and enforced the doctrine that where congress, by general reference, adopts state legislation, it must be taken to mean the legislation of the state as it existed at the instant the congressional act of adoption was passed, and does not apply to any future legislation which the state may see proper to enact.

We take it no more need be said touching the rules of law applicable to the question in hand. All that remains is its application.

In *1874*, when section 5509 became a law, by any process of enactment for the *last* time, the present district of *Colorado was not then a state*. At that time it was one of the *territories* of the United States, and did not become admitted into the Union as a *state* for more than two years thereafter, to wit, on *August 1, 1876*.

There being no *state* of Colorado when section 5509 became a law, there was no *state* legislation within the present borders of the State of Colorado to which that section could attach or which it could adopt.

Legislation which might be enacted by the legislature of Colorado after it became a state, in the matter of creating a penal Code and prescribing punishments thereunder, would come neither within the *letter* nor the *spirit* of section 5509. It would not come within the *letter*, because section 5509 only adopted such *state* legislation as was in existence when it became a law, and such legislation did not exist within the limits of the present district of Colorado. It would not come within the *spirit* or meaning of the section, because, as already pointed out by the decisions of this court and the Circuit Court of Appeals of the eighth circuit, congress could not constitutionally delegate the power to a state legislature to prescribe *in the future* what acts should constitute an offense against the laws of the United States, or provide punishment therefor.

We are thus confronted with a clear instance of congressional *casus omissus*, which is not within the power of this court to supply by any process of judicial construction.

It is not necessary to go far in seeking for an explanation of the peculiar legislation embodied in section 5509.

As already pointed out, that enactment was primarily designed to benefit and protect the then recently emancipated negroes in the theretofore slave-holding *Southern states*, and, in view of the mischief intended to be remedied, there was *no occasion for or thought of legislating for the territories* of the United States. Hence, the section was so drafted that its whole force was spent within the limits of that portion of the territory of the United States as then existed within the borders of the states of the Union, duly admitted as such, pursuant to the Constitution of the United States, and laws enacted thereunder. Congress, in this highly penal statute, having specially limited the scope of the enactment to offenses *then* denounced by *existing state* legislation, and conformable to the punishment *then* provided for thereby, there is no authority in this court to extend the provisions of the section to a *then territory* of the United States, but which, since that time, has been admitted into and become one of the states of the Union.

We take it for granted that it is unnecessary to enter upon a lengthy review of authorities in support of the position that the word "state" (especially when used in a *penal* statute, imposing severe punishment), can not be extended so as to include a *territory* of the United States, but, as a matter of superabundant caution, we will cite a few of the many cases bearing upon this particular subject.

In U. S. vs. Ames, 95 Fed., 453, the court had under consideration the provisions of the act of March 2, 1895, 28 Stat., page 1863, which made it an offense to cause lottery tickets to be carried or transferred from one state to another, and the court held that the word "state," as so used in said act, must be held to have been used in a constitutional sense, and *thereby excluding a territory of the United States*. In arriving at this conclusion, the court, *inter alia*, said (page 456):

"Here is an act creating an offense unknown to the common law. It is a cardinal canon in the construction of criminal statutes that they should be construed strictly; that the courts

have no right to extend their meaning beyond the scope of the terms employed; and we must seek for the intent of the law-making power in the language which has been used in the act itself. When congress, knowing, as we must presume it did, that the word 'state,' as used in the *Constitution*, means simply *state*, and not *territory* * * * we must assume that it was in the constitutional sense, as interpreted and declared by the Supreme Court of the United States.

"It may be said—it may occur to any one to say—that the transportation of lottery tickets into a territory which was under the absolute control of congress was as much within the mischief intended to be prevented as the transportation of such tickets from one state to another; but it is no more true than was the powerful argument presented to the Supreme Court, that it was not intended to prohibit the citizens of the United States, because they happened to be domiciled in a territory, the protection of the courts of the United States, and it was as easy a matter in the one case as in the other, as suggested by the chief justice, to apply the remedy. If congress desired to prohibit the transportation of lottery tickets into a *territory* of the United States, *it should have said so.* We may not enlarge the scope of a criminal statute to declare an offense which congress has not created, because we see that the mischief is the like mischief that congress has sought to prevent in respect to other geographical divisions of the Union. I have come reluctantly to the conclusion that it would be judicial legislation for the court to hold, in view of the decisions of the Supreme Court, that the word 'state,' as used in this act, includes the territories of the United States. It follows, therefore, that this complaint presented to the commissioner charges no offense against this petitioner, and that he must be discharged from imprisonment."

The like conclusion was reached and announced under the same statute, in U. S. vs. Whelpley, 125 Fed., 616, holding that the word "state," when used in a penal statute, *meant a state in its constitutional sense and not a territory of the United States.*

In Downes vs. Bidwell, 182 U. S., 244-391, this court, through Mr. Justice Brown, on page 270, reviewed all of its previous decisions on the subject of the use of the word "state" in federal legislation, and announced the following propositions as conclusively settled by such adjudications:

"1. That the District of Columbia and the *territories* are not *states* within the judicial clause of the Constitution, giving jurisdiction in cases between citizens of different states.

"2. That *territories* are not *states* within the meaning of Revised Statutes, section 709, permitting writs of error from this court, in cases where the validity of a state statute is drawn in question.

"3. That the District of Columbia and the territories are states as that word is used in *treaties with foreign powers*, with respect to the ownership, disposition and inheritance of property.

"4. That the territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as congress may see fit to establish."

It was further said, in the opinion in the same case:

"It is sufficient to say that congress has * * * *specifically* legislated for the *territories* whenever it was *its intention* to execute laws beyond the limits of the states."

It will thus be seen that the only instance in federal legislation wherein the word "state" is deemed to include the territories of the United States, or the District of Columbia, is where *treaties* are entered into by the United States *with foreign powers* in respect to the ownership, disposition of, and inheritance of property by subjects of such foreign powers within the limits of the United States.

In all other cases where the word "state" is used in the various federal judiciary acts, and other legislation, including federal penal laws, it does not include territories.

If other decisions were necessary we might refer to U. S. vs. Furlong, 5 Wheaton, 184, where the words in a federal statute, "out of the jurisdiction of any particular state," were held to mean any particular state *in the Union*.

And in U. S. vs. Pirates, 5 Wheat., 184, 200, the same words in the Crimes act of 1780 was construed to mean "out of any one of the United States."

But we forbear further citation of adjudged cases. It must be as evident as an elementary mathematical demonstration, that the provisions of section 5509 are only applicable to such portions of the United States as had become incorporated into the Union as states, and so much of the geographical limits within the United States as were *territories* thereof at the time of the final enactment of that section, were, and are, completely without its letter, spirit, meaning and intent. There-

fore the present state of Colorado does not come within the purview, effect or operation of such section.

It may not be amiss to here call attention to the fact that while section 5509 is expressly limited to *states*, section 5518 is explicitly made applicable to "any state or *territory*," thereby evincing an intention upon the part of congress to make section 5518 cover more geographical area than section 5508.

We have said that section 5509 was enacted for the last time on June *22, 1874*. Although probably unnecessary, we will cite authorities in support of that statement.

The first case to which the attention of the court will be directed is that of Wright vs. U. S., 15 Ct. Cls., 80, decided in 1879. The court distinguished between the *first* edition of the Revised Statutes, published in *1875*, and the *second* edition, published in *1878*, saying, on page 87:

"The second (1878) edition is neither a new revision nor a *new* enactment, but is *only a new publication*. It is a compilation, containing a copy of the *original* Revised Statutes, like the first edition, with certain specific alterations and amendments made by subsequent enactments." * * * * *

"The first (1875) edition is a transcript of the original Revised Statutes, preserved in the department of state, and is prima facie evidence thereof."

And on pages 85 and 86 it is said:

"The Revised Statutes are an act of congress, duly passed, * * * received by the secretary of state and deposited in the state department, where alone the originals of all laws of the United States are preserved. They were approved and became the *law June 22, 1874*."

For other authorities, expressly in line with the Wright case, see:

McLean vs. The St. Paul & Chicago Ry. Co., 17 Blatchford, 363, 365.

United States vs. Auffmoedt, 122 U. S., 197, 210.

United States vs. Hirsch, 100 U. S., 33, 35.

United States vs. Lacher, 134 U. S., 624, 626-7.

United States vs. Bowen, 100 U. S., 508-13.

Arthur vs. Dodge, 101 U. S., 34, 36.

Bate Refrigerating Co. vs. Sulzberger, 157 U. S., 1, 39.

In Re Dana, 68 Fed., 886, 899.
Victor vs. Arthur, 104 U. S., 498, 499.
Murdock vs. Memphis, 20 Wall., 590, 617.

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## IX.

**Review of precedents in conflict with the foregoing propositions.**

A careful research and thorough examination of all adjudged federal cases involving prosecutions under sections 5508, 5509 and 5518, respectively, affords, in our judgment, due warrant for the statement that there is *but one* precedent which can be produced that squarely conflicts *with any* of the propositions hereinbefore discussed.

What we mean is, that only *one* federal case exists wherein the soundness of any of the positions herein relied upon was ever squarely *challenged, discussed* and *ruled* upon adversely to our contention.

That case is U. S. vs. Patrick, 54 Fed., 338, a decision by the Circuit Court for the Middle District of Tennessee. There the point was specifically raised by defendant's counsel that, where a federal officer was conspired against in the discharge of his official duties, the conspirators were not subject to prosecution under the provisions of sections 5508-9, but only under the provisions of section 5518.

The court denied the soundness of such contention, holding,

That an officer, in the discharge of public duties, was exercising at one and the same time both a private right as a citizen and a public duty as an official, and that a conspiracy to interfere with the discharge of official functions was, in legal contemplation, a conspiracy involving a *dual* purpose, the one interfering with the exercise by a citizen of a right or privilege secured to him by the laws or Constitution of the United States, and also against the same person in his official capacity.

No authorities are cited in support of the somewhat remarkable conclusion thus reached.

We have already exhaustively discussed, and, as we believe, successfully established the fallacy of the doctrine thus de-

clared in the Patrick case, and we will not further debate the proposition at this juncture. The position that a conspiracy directed against the exercise of official functions should be prosecuted under section 5518, and not under section 5508, was disposed of therein in the following manner: The court quoted section 5518, and then added (page 350):

"This statute is in perfect harmony with sections 5508 and 5509, and, instead of showing that congress did not intend, by said sections, to include the case of a citizen in the exercise of a right or privilege appertaining to official station or function, it tends strongly in the other direction."

In reaching this unique conclusion, the court seems to have wholly overlooked the doctrine of the effect of *special* legislation on a given subject-matter covered by general legislation which, standing alone, might include the matters covered by the former.

We have shown that virtually every text book on statutory construction, and repeated decisions of this court, are wholly at variance with the arbitrary and illogical ruling thus made on the subject under consideration.

In addition to the principles hereinbefore discussed and authorities previously cited, pointing out the fallacy of the conclusions reached in the Patrick case, we will now call the attention of the court to U. S. vs. Sanges, et al., 48 Fed., 78, the opinion in which was delivered by Judge Lamar, then associate justice of the Supreme Court of the United States, and concurred in by District Judge Newman. The indictment in that case was drawn under the provisions of section 5508 and 5509, the charge being that a conspiracy was entered into to injure and oppress a citizen because of the fact that he had theretofore appeared, in obedience to a subpoena, before a grand jury, impanelled by a federal court, and had given evidence before such grand jury, of the violation by the conspirators, or some of them, of the penal provisions of the internal revenue laws of the United States, and that the conspirators, in pursuance of said plot, did kill and murder the said citizen who had so testified against them, and the question was squarely raised whether such state of facts would warrant a

prosecution under said named sections. The court held in the negative. In the course of the opinion it tersely stated the legal propositions involved in these terms (page 81):

"Is the right to appear as a witness and to testify before a grand jury of a federal court a right secured by the Constitution and laws of the United States in the *sense* in which that language is employed in those sections (5508 and 5509)?"

The court thereupon proceeds to review the history of the circumstances surrounding the enactment of those sections, and the purpose thereof, stating, in accord with what we have heretofore said, that such legislation constituted a portion of what is known as the enforcement act of May 30, 1870, and that it was primarily passed for the benefit and protection of the colored race. That the supposed right of a citizen of the United States to testify before a federal grand jury was not such character of federal right as was designed to be protected by section 5508, and that the killing of such witness, in pursuance of a conspiracy to injure him because he had so testified, did not constitute an offense under sections 5508 and 5509.

The court then proceeds to quote as follows from the annual report of the attorney general of the United States, for the year 1890 (page 82):

"It is certainly an anomaly in government that those who have committed *murders* for the purpose of stopping prosecution in the federal courts should not only not be punished, but not even be put upon trial, although in at least two cases in one district, during 1890, well known. Yet such is the fact. It is needless to say *that the federal courts have no adequate jurisdiction of these offenses.*"

The attorney general then quotes section 5509 in full, and proceeds:

"If section 5509 were so *broadened* as to make any felony committed while in the act of violating any statute of the United States triable in the United States courts, and punishable according to the laws of the state wherein the same is committed, it would greatly help in the administration of justice. So long as persons *who kill officers*, witnesses or jurors for the purpose of *impeding* the *administration* of justice can *only* be *tried* and *punished* in a federal court as for a *minor* offense the administration of the United States laws, and the laws themselves, in many districts, will have little respect."

The court then proceeds to show that there was, and is, a specific section of the Revised Statutes, covering conspiracies to deter, injure or oppress a party or *witness* from testifying or appearing in a federal court, such specific section being 5406, and because of its existence no prosecution could be maintained under section 5508, in any case falling within the purview of section 5406. This is exactly the argument which we advance here, that any conspiracy falling within the terms of section 5518, aimed or directed against officials of the United States, is not subject to prosecution under section 5508, even though it might be admitted that, in the absence of 5518, cognizance of the conspiracy might be taken under 5508.

The court then discusses the distinction between right and duty in accord with the principles hereinbefore contended for, saying (pages 83-84):

"The right or duty of the *government* to provide for the protection given by section 5406 to parties, jurors and witnesses arises, not so much from the interest or *right* of those persons as from the necessity of the government itself that the great agencies of its judicial organism should not be impeded in their official administration of the laws, and that all its instrumentalities should be protected against the obstructions of force or fraud. The *status* of a witness in a court, pending either a civil or criminal proceeding, is in law regarded as one of *obligation* and *duty*, which he is compelled to perform, or of a *function* which *he is obliged to discharge*, rather than *a right* on his part which he *may* or *may not* exercise, according to *his own will*."

This argument, it will be observed, applies with full force to our contention that the status of a federal officer or quasi-official involves the performance of *obligations and duties*, rather than the free exercise of a right which such officer may or may not exercise according to his pleasure.

The opinion further proceeds:

"With respect to the prosecution for a crime pending in a federal court, or in a United States grand jury, the right which this particular section designs to protect is a *public* right, i. e., the right of the *United States* to have its witnesses and their testimony, and to have them protected in going to and returning from the court. The wrong punished in such cases is a *public* wrong, and its correlative is a *public* right."

The court then reviewed all of the decisions extant under sections 5508 and 5509, and concludes with the holding that the conspiracy referred to in the indictment should have been prosecuted under section 5506, and an indictment aptly drawn thereunder, and that it had no jurisdiction in the premises under either section 5508 or 5509, or both.

We submit that the reasoning and conclusions in this case completely annihilate the wholly illogical and untenable propositions advanced in the Patrick case.

We also desire to again call the attention of the court to the case of *U. S. vs. Johnson et al.*, 26 Fed., 682-4, where a prosecution under section 5518 was upheld, the character of the conspiracy there charged being in all essential particulars the same as those set out in the indictment herein.

In conclusion upon this particular topic, we may add that if any other instance can be cited where a prosecution was maintained or conviction had under sections 5508 and 5509, where the object of the conspiracy was to interfere with the discharge of federal official duties, or because of such discharge, *the point was not raised, discussed or specifically called to the attention of the court*, that the prosecution should have been based on the provisions of section 5518, and not upon said earlier sections.

We think we may safely leave this branch of the case with the assertion (which we are fully justified in making) that under settled principles of law there can be no reasonable doubt the prosecution in the present instance is not maintainable under sections 5508 and 5509, but should have been based upon section 5518, *exclusively*, and the indictment aptly drawn to charge the offense denounced thereby. This the indictment does not do.

In conclusion we assert, with reasonable confidence in the correctness of our position, that whether or not the court is prepared to hold with us upon *all* of the propositions above discussed, nevertheless, there are ample defects, both of form and substance, to justify this tribunal in holding that no offense under Sec. 5508 is charged in the pending indictment, and if this be true, then the trial court could not lawfully take cognizance of the crime of murder charged therein, and hence no reversible error was committed in quashing so much of the indictment as

tempted to allege the commission of such crime as a substan-
ve offense cognizable under said Sec. 5509.

The fact should also be borne in mind that the inferior
deral courts, sitting in the district of Colorado, have not, and
ver have had, jurisdiction of offenses coming within the pro-
sions of the latter section, and for this reason alone the charge
murder contained in the indictment was not within its power
hear, try or adjudicate.

Wholly regardless of the tenability of either or all of the
regoing propositions, the judgment sustaining the pleas in
r should be here affirmed upon independent grounds, which
will now present and discuss.

## BRIEF AND ARGUMENT IN SUPPORT OF PLEAS OF FORMER ACQUITTAL.

### I.

**Each count of the indictment attempts to charge in substance and effect the commission of two distinct offenses, viz., conspiracy under section 5508, and murder under section 5509.**

Before entering upon a discussion of the merits of the pleas under consideration, we desire to call the attention of the court to the fact that, although the charges of conspiracy and of murder, committed in pursuance of the effort to carry the conspiracy into effect, appear in each of the several counts of the indictment, nevertheless, for the purposes of the pleas in bar, they are to be treated as separate and distinct offenses, as much so as though they were respectively charged in separate and distinct counts.

Hence, the pleas in bar, if meritorious and sufficient as a defense to the accusation of murder, are properly pleaded.

In Logan vs. U. S., 144 U. S., 263, the indictment there under consideration, like the one at bar, contained counts under sections 5508 and 5509, a conspiracy under sections 5508, and a charge of murder committed in pursuance thereof under section 5509, the two charges being set out in each count, respectively, and in discussing the force and effect of counts so framed, the court, on page 307, said:

"The indictments charged the defendants not only with a conspiracy, which *was not* a capital offense, but *also with* having in the prosecution of the conspiracy committed a *murder*, which *was a capital offense*."

And the court held that, *a capital offense* being charged, it was error to put the defendants upon trial, over their objection, until at least two days had elapsed after they had been furnished with a list of the witnesses to be called against them, as provided by the federal statutes with reference to prosecutions for capital offenses, and that such error, per se, furnished ground for reversal.

On the succeeding page the court said that the government might have elected to prosecute only for the conspiracy, in which event the furnishing of the list of witnesses was not required, but having prosecuted for the murder as well, the indictment should be treated as a distinct prosecution for the latter offense, so as to afford the defendants the benefit of every provision of federal procedure relative to that specific character of crime.

In the same case in the lower court, 45 Fed., 892, the court instructed the jury that "two offenses" were charged in the indictment, the first a conspiracy under section 5508, and, second, the crime of murder, under section 5509.

It has been frequently decided in prosecutions under these sections that the jury may acquit of the murder, but convict on the conspiracy charge. These holdings clearly show that the mere circumstance of the two crimes being charged in one and the same count will in nowise prejudice the defendants in filing such pleas or making such defense, or of any other character of protection secured to them by law in the matter of procedure which might be proper or available if such offenses were contained, and could properly be set forth, in separate and distinct counts.

We take it, therefore, that no technical question of procedure will be raised, or, if urged, can avail, to preclude a hearing and decision upon the intrinsic merits of the pleas.

The plea of "former acquittal" in the state court upon the charge of murder set out in the indictment is, we submit, a complete defense, and bar to a second trial or prosecution in any federal court for the same murder.

Should the court decline to favorably entertain our position that the lower court is without jurisdiction to try these defendants upon the charge of murder for the special reasons hereinbefore assigned in our argument in support of the demurrer to the indictment, then our present contention will be that, even though it could have lawfully tried these defendants upon such charge, if no proceedings in that behalf had been theretofore taken in the state court, that the previous trial in, and acquittal of the defendants by, the latter, of such charge,

deprived the federal courts of the right or lawful authority to re-try them upon the same accusation.

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## II.

**The last clause of article VII, of the amendments to the federal Constitution, which reads "and no FACT tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law" PROPRIO VIGORE, precludes a re-trial of the murder charge in the lower court.**

The clause of the constitutional amendment just quoted has been judicially construed by this court to apply to *state*, as well as federal courts, and by virtue of such construction the amendment is interpreted to mean as though it read in words:

"And no fact tried by a jury *in either a state or* federal court, shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

In the case of the Justices, Etc., vs. U. S., 9 Wall, 274-282, the position just stated was declared to be sound law, all the judges concurring, the syllabus of the case reading:

"The seventh amendment to the Constitution of the United States applies to a cause tried by a jury in a *state* court."

The case which called for this holding by the court was one involving the constitutionality of the act of congress of March 3, 1863.

Such act of congress, in substance, provided that in any suit or prosecution, either civil or criminal, commenced in any state court, against any official, civil or military, of the United States, for any arrest or imprisonment made during the rebellion, under color of any authority, by or under the president of the United States, it should be competent for either party, within six months after the rendition of a judgment in any such case, to remove the same by writ of error or other process to the proper Circuit Court of the United States, and that the latter court should thereupon hear, try and decide both the facts and the law in the same manner as if the suit or prosecution had been originally commenced in the Circuit Court.

A suit had been brought in the *state* court for assault, battery and imprisonment against the marshal of the Southern district of New York and his deputy. The defense interposed in the case by the defendant marshal and deputy was that the matters complained of were all had and done in lawful pursuance of an order theretofore made by the president of the United States, during the existence of the rebellion and incidental to the suppression thereof. The cause was tried in the state court, and a judgment was therein rendered in favor of the plaintiff. Thereafter, and within the time prescribed by the act of congress referred to, the cause was removed to the Circuit Court of the United States for retrial. The validity of the removal and the constitutionality of the act of congress was thus squarely presented to this court for decision.

After a lengthy review of all the authorities having any supposed application to the questions involved the court held that the *first* clause of Article VII of the constitutional amendments was designed to apply to federal courts only, but that the last clause (the one now under consideration) was applicable to either *state* or federal courts, and the opinion concludes with these words:

"Our conclusion is that so much of the fifth section of the act of congress, March 3, 1863, * * * as provides for the removal of a judgment in a state court, and in which the cause was tried by a jury, to the Circuit Court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution, and is void."

Mr. Justice Story, sitting at circuit, in the case of the U. S. vs. Gilbert, et al., 2 Sumner's Reports, pages 60-61, considered the particular clause of the Constitution now under review, and held that it was applicable to *criminal* cases, the learned justice there saying:

"The Constitution has also in another clause declared that 'no *fact* once tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.' The only modes of making this re-examination, known to the common law, are by a writ of error and a new trial, and if by the common law there cannot be a new trial in a capital case, after a regular trial once had upon a

good indictment, as seems to me to be conclusively established by the English authorities already cited, then this clause also carries in its bosom another virtual prohibition" (i. e., prohibition against a second trial of a criminal charge where either a previous conviction or acquittal existed).

This court, in Ex parte Lange, 18 Wall, 163, also recognized that the constitutional clause under consideration was applicable to penal prosecutions, saying in that behalf:

"These salutary principles of the common law (forbidding second prosecutions in case of former acquittal) have to some extent been embodied in the Constitution of the several states and the *United States*.

"By article VII of the amendments to the *latter* instrument it is declared that *no fact once tried* by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, and by article V that no person shall for the same offense be twice put in jeopardy of life or limb * * * nor be deprived of life, liberty or property without due process of law."

The reasoning of the court, following such references to these constitutional guarantees, clearly evinces that *each* of them is pertinent to the defense of former acquittal.

Applying these authorities to the case at bar, the pleas of the defendants disclose that the "*fact*" once tried in a state court of competent jurisdiction was the fact of whether the killing of the deceased Joseph A. Walker was or was not a felonious homicide, to wit, murder, and the jury, duly impanelled in that court, by its verdict, solemnly declared such killing neither murder nor any felonious grade of homicide, and found the defendants not guilty.

The identical "*fact*" thus tried before a jury in a state court of competent jurisdiction is now sought to be retried in the lower federal court, as the murder charged in the state court, and the murder charged here involves the same accusation *in fact*, regardless of the soundness or otherwise of the technical contention which will be relied upon by the prosecution, that one and the same felonious homicide may, under some circumstances, constitute a murder against the laws of the state of Colorado, and likewise a murder against the laws of the United States.

It is manifest that the facts which were relied upon in the state court to secure a conviction of these defendants upon the charge of murder are the same facts that will have to be relied upon in the federal court.

The person alleged in both courts to have been killed is the same individual, to wit: Joseph A. Walker. The time and place of the killing and the alleged felonious character of the homicide are identical in each prosecution. The defendants are the same.

Hence, the language of the constitutional provision under discussion specifically covers the case at bar, and therefore denies to the federal court the power to re-try the facts in relation to the alleged murder, even though there might exist a specific act of congress which, in explicit language, attempted to confer upon any federal court the power of such re-trial. No act of congress exists which, *in terms*, assumes to clothe a federal court with such unconstitutional authority, nor, as we will presently undertake to show, was it the intent of congress that the federal courts should be vested with the power, under the provisions of section 5509, to re-try these defendants upon said charge.

We may add that no decision, nor any *dicta*, of this court, or, for that matter, of any inferior federal court, can be found which denies the force and application of the last clause of Article VII of the amendments to the federal Constitution as here contended for by us.

Whatever *purely obiter* statements may be found in any federal decision, Supreme or inferior, which, taken literally and apart from the special facts involved in the case where such remarks exist, which may *seem* to warrant the idea that a double prosecution may be had, once in the state court, and again in the federal court, based upon the same acts or facts, but where supposed violations of *both a state* and a federal penal statute might result therefrom, in *no instance have such courts, or either of them, in fact, sustained such double prosecution*, nor was the attention of the court wherein such *obiter* remarks may appear directed to the clause of the Constitution under consideration.

We could, therefore, safely rest the sufficiency of the pleas under consideration upon the concluding clause of Article VII of the amendments to the federal Constitution, wholly regardless of any other provision, rule of law or constitutional guaranty.

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## III.

**The principles or rules of the common law referred to in the seventh amendment to the federal Constitution deny to the federal court the right to re-try the defendants upon the charge of murder.**

The common law of England recognizes the power to be vested in parliament to try and punish, in an English court, a murder committed by an English subject in a *foreign* country, although the offender might be also subject to the criminal jurisdiction of the country where the offense was committed. The theory upon which this principle of the common law is based is, that an English subject, when abroad, is entitled to the protection of his own government against wrongs which might be committed *against him*, under color of the laws, or by the connivance of foreign authority, and this right of protection carries with it the correlative duty on the part of the English subject of not violating any criminal laws of the foreign jurisdiction; and to make this duty effectual, the English government was deemed vested with the power to pass statutes making it a crime for an English subject, while on foreign soil, to violate its criminal laws, and which crime might be tried in and punished by an English court.

See State vs. Main, 16 Wis., 419-420, where it was said:

"It seems to be well established that every nation has the right to punish its own citizens for the violation of its law *wherever committed*. This right is based upon the duty of allegiance."

And People vs. Tyler, 7 Mich., 221, Wheaton's Int. Law, 132-169 and 176, and Story on the Conflict of Laws, section 21, uphold the same principle.

Brown on Jurisdiction (section 96) observes:

"Each nation will determine for itself what punishment shall be imposed on persons who violate its laws *abroad*.

"The crime is as grave if done in a *foreign land* as if done in the capitol of the nation."

In Cooley's Blackstone, volume IV, page 303, the learned commentator, in speaking of the jurisdiction of English courts to try and punish for offenses committed by an English subject in a foreign country, says:

"Murders, also, whether committed in England or *foreign parts*, may, by virtue of the Statute 33, Henry 8th, c. 23, be inquired of and tried by the king's special commission, in any shire or place in the kingdom."

And, under such legislation, it has been squarely decided by the English courts, where an alleged murder had been committed by a British subject in a foreign country, and for which offense he had been tried and acquitted by a foreign court of competent jurisdiction, that he could not be thereafter tried for the same murder in the English courts, though but for such former trial and acquittal, the jurisdiction of the English courts would have been undoubted.

In the case of The King vs. Capt. Roche, Leach's Crown Cases, volume 1, page 135, there is contained the following note by the reporter on the question of the validity of a plea of *autrefois acquit* in a prosecution in an English court for a murder committed in a foreign jurisdiction, where the courts of the latter had previously tried and acquitted the defendant:

"It is a bar, because a final determination in a court having competent jurisdiction is conclusive in all courts of *concurrent* jurisdiction; therefore, if A, having killed a person in *Spain*, were there prosecuted, tried and acquitted, and afterward were indicted here, at common law, he might plead the *acquittal in Spain* in bar. Bull, N. P., 245, as in the case of Mr. Hutchinson, who had killed Mr. Colson in *Portugal*, and was acquitted there of the murder, and, being afterwards apprehended in England for the same fact, and committed to Newgate, he was brought into the Court of Kings Bench by *habeas corpus*, where he produced an exemplification of the record of his acquittal in Portugal; but the king, being very willing to have him tried here for the same offense, it was referred to the consideration of the judges, who *all* agreed that, as he had been

already acquitted of the charge by the law of *Portugal*, he could not be tried again for it in England. See Beak vs. Thyrwhit, 3 Mod., 194; S. C., 1 Show., 6."

It is thus shown that, under the principles of the common law, it will be violative of the fundamental rights of these defendants to re-try them in the federal court for an alleged murder concerning which they have previously been duly tried and acquitted by a court of competent jurisdiction of the state of Colorado.

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## IV.

**Discussion of the jurisdiction respectively vested in the courts of the state of Colorado, and of the federal court, to try defendants upon the charge of the murder of Walker.**

That the state District Court of La Plata county was vested with due jurisdiction under the Constitution and laws of the state of Colorado to try, convict and punish or acquit these defendants, as the facts might warrant, upon the charge of murder of Joseph A. Walker, is a proposition the correctness of which is too clear for discussion, and we take it will not be questioned by government counsel.

When a homicide is committed within the limits of the state of Colorado (and not upon any portion thereof within the exclusive jurisdiction of the United States, such as a fort, arsenal, or other place ceded by the state to the United States for exclusive jurisdictional purposes), the proper courts of the state are vested with original complete jurisdiction to try, convict or acquit the perpetrator of the homicide upon the facts, wholly regardless of the question whether the person killed was or was not an officer of the United States, and likewise whether the latter was or was not in the discharge of any federal duties at the time of the killing.

The courts of the United States sitting within and for the district of Colorado (*if* section 5509 is applicable thereto) may be vested with a *qualified* concurrent jurisdiction to try the perpetrator of the identical homicide. That is to say, the fed-

eral court of that district, assuming section 5509 to be applicable, possesses, with the state courts a *concurrent* but *ancillary* jurisdiction to try such murder charge, when the killing of the deceased occurred in the consummation of a conspiracy entered into by the perpetrators of the killing in violation of the terms of section 5508.

The most that can be urged, therefore, on behalf of the jurisdiction of the federal court, so far as the *murder* charge is concerned, is that it possesses not an exclusive, but only a *qualified, concurrent* jurisdiction thereof with the state court.

That the jurisdiction of the federal court in the premises is, at most, only a concurrent one with the state courts is expressly declared by the provisions of the Revised Statutes, under which the pending indictment is based.

Section 5328, of title 70, of the Revised Statutes of the United States, entitled "Crimes," provides:

"Nothing in this *title* shall be held to *take away or impair* the jurisdiction of the courts of the several states under the laws thereof" (and section 5509 is part of the "*title*" thus referred to).

The effect of said section 5328 was recently passed upon by this court in Sexton vs. California, 189 U. S., 319.

The defendant was there indicted in a court of California for the crime of extortion. The same acts constituting the crime of extortion under the laws of the state were also made punishable under the federal statute, and the contention of counsel for the defendant was that the federal statute, relating, as it did, to extortion in connection with the administration of the revenue laws of the United States, was cognizable only by the federal and not by the state courts. In answer to this contention, the court, on pages 324-325, remarked:

"The federal statute which provides for extortion does not take away or impair the jurisdiction of the courts of the several states under their laws to proceed and punish as is therein provided for.

"The jurisdiction of the state court over the crime of extortion when perpetrated under the circumstances stated in the indictment is at least *concurrent* with that of the courts of the United States.

"The section (5328) was not intended to merely permit a state court to punish a different offense involved in the one act. It was intended to leave with the state court, unimpaired, the same jurisdiction over the act that it would have had if congress had not passed an act on the subject."

It is thus seen that this court has expressly declared that the effect of section 5328 is to clothe the state and federal courts with concurrent jurisdiction, where the same act may be violative of both the state and federal criminal law.

We will now very briefly cite the authorities touching the effect of a judgment of a court of *concurrent* jurisdiction in a criminal case, as a bar to a subsequent prosecution for an offense based upon the identical acts upon which the first prosecution was founded. We will then proceed to review all of the authorities having any bearing upon the subject of whether a federal court can lawfully re-try a defendant for the identical crime for which he may have been once tried and acquitted in the state court, even though the technical proposition may be sound that by one and the same act an offense was committed both against the laws of the state as well as of the laws of the United States.

Having shown that the jurisdiction of the state court and the federal court is concurrent upon the charge of murder under consideration, we submit that the rules applicable to the effect of a judgment by one of such courts in a criminal case is conclusive upon the other, notwithstanding the technical distinction that the prosecution in the one court may be conducted in the name of the state, and in the other in the name of the United States, the defendant or defendants being the same in both prosecutions, and each prosecution being based upon the identical facts.

In Brown on Jurisdiction, page 247, the text reads:

"Where the United States punishes an *act* as a crime and the *same act* is criminal by the statute of a state, and the jurisdiction of the United States is not exclusive, then a court of each may try the offender; but usually the second conviction is *barred* by the first, where the crime is the same and jurisdiction concurrent; but if the character and *nature* of the crime are not the same, then the court will not consider in the second case the former conviction and punishment."

And this distinction, so made by this law writer, is, as we will hereafter point out, that which was in the mind of this court in every instance where it has had occasion to consider, either directly or indirectly, the effect of a previous trial in a state court for a crime based upon the identical act, and which crime at one and the same time was an offense against the laws of the state and of the United States.

In section 442, Wharton's Crim. Pl. and Pr. (9th Ed.), the text reads:

"An offense, however, may have two *aspects*, so that one sovereign may punish it in the first aspect, and another in the second. Thus, uttering of forged coin may be punished by a state as a *cheat*, and by the federal government as *forgery*. In such cases it is argued by a late able federal judge (Grier J.) that one judgment can not be pleaded in bar to the other. But this is to be taken subject to the qualifications hereinbefore expressed. If the *charges* be *identical*, then *the court first seizing jurisdiction absorbs the offense*."

The distinction thus clearly pointed out by Wharton should never be lost sight of. The same act may constitute one *kind* of crime under the laws of the United States, and at the same time *a different, distinct character* of crime under the state law. It often occurs that by one and the same act the perpetrator thereof may commit *two different kinds* of offenses under the laws of a state, viz., arson and murder, and *e converso*, the same act may constitute a *particular* kind of an offense against the laws of the United States, and, *eo nomine*, a distinct and *different character* of offense, in legal contemplation, under the laws of the state.

Under such circumstances it *may be* that, in *strictness*, an acquittal or conviction of the one character of offense may not be a bar to a subsequent prosecution in the courts of the other sovereignty, for the different and *distinct character* of offense under its laws, though such offenses may be founded upon or grow out of identical acts or transactions

But that is *not this case*, either in fact or in principle. The crime for which these defendants were tried and acquitted in the state court was the crime of murder, *eo nomine*. The crime for which they are here indicted in the federal court is likewise

the same crime of murder, and is no other or different character of offense.

The crime of murder charged in this case is the crime of murder as originally defined by the laws of the state of Colorado. To determine whether, as a matter of law, these defendants ever committed the felonious homicide with which they are charged, *recourse must be had to the state law*, for section 5509 does not attempt to define it. The identical statute, to wit, the *state statute*, is, at last, the *sole* foundation for the jurisdiction of either the state or the federal court to take cognizance of the charge of murder, though technically it may be said that section 5509 adopts the state statute on the subject of murder, and that by such adoption the federal courts possess a qualified, concurrent jurisdiction to take cognizance thereof, while the state courts, under the identical statute adopted by section 5509, possess original jurisdiction to try the same offense.

The *state* law, therefore, both as to the essentials of the offense and the nature and character of the punishment, must be resorted to and relied upon in the exercise of any jurisdiction by this court over the crime of murder here considered.

It will thus be seen that in *name*, in *characteristics*, in *punishment* and in *act*, the offense of murder here sought to be prosecuted is the same murder—and no other, or different—than that tried in the state court, and upon which trial these defendants were lawfully acquitted.

This is not a case, therefore, where congress, within the scope of its constitutional authority, has passed a penal statute, *defining therein* what should constitute the essentials of a federal crime, and has affixed a prescribed penalty therefor, while, on the other hand, the state has also passed another and a *different* statute, prescribing the constituents of a *distinct and different character of offense*, and affixing thereto another and different punishment from that prescribed by the act of congress.

Under such circumstances the two statutes may have the effect of creating two crimes, one against the state, and the other against the United States, although the same acts may be the basis of a prosecution under either.

Speaking with due reserve, we say that there never has been an instance in the history of the jurisdiction of this country,

under a statute like section 5509, which, in general terms, refers to the state statute, both for the definition of the crime thereby denounced, and likewise adopts the punishment therefor prescribed by the state law, where a valid trial and acquittal in a state court have occurred, that a re-trial for the identical offense, *co nomine*, in the federal court was sanctioned.

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## V.

**The spirit, if not the letter, of Article V of the amendments to the Constitution of the United States, reading "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * * nor be deprived of life, liberty or property without due process of law," inhibits a re-trial in the federal court of the murder charge contained in the indictment.**

In Boyd vs. U. S., 116 U. S., 635, this court said:

—"constitutional provisions for the protection of person and property should be *liberally* construed. A *close* and *literal* construction deprives them of *half* their efficacy, and leads to *gradual* depreciation of the right, as if it consisted more in *sound* than in *substance*. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

And in Ex parte Lange, 18 Wall., 163, 205, the court remarked (page 178):

"There is no more sacred duty of a court than in a case properly before it to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and of the statesman, and in such cases *no narrow* or *illiberal* construction should be given to the words of the fundamental law in which they are embodied."

Bearing in mind these humane principles of constitutional interpretation, we now enter upon a review of what is to be found expressed in the decisions of the American courts, and the language employed by standard text writers, for the purpose of showing, as we believe we can beyond a peradventure of

doubt, that no federal court, either supreme or inferior has ever *decided*, or intended to *decide*, that under the circumstances set out in the pleas in bar herein, this court would be warranted in assuming jurisdiction to re-try these defendants upon the charge of murder. While, per contra, we confidently expect to be able to establish that, as far as precedents may exist that possess any controlling force, they are all to the effect that this court should stay its hand and proceed no farther in that behalf.

We will first direct the attention of the court to cases and authorities squarely holding, on a state of facts strictly analogous to the questions presented by the pending record, that the right of re-trial herein does not exist, and we will then review every case upon which opposing counsel may rely, to establish either that they are not in point, or that the remarks used were not intended to have the effect which will be here sought by government counsel to have attributed to them.

In Houston vs. Moore, 5 Wheat., 1, there came before this court for consideration, the force and effect of a statute of the state of Pennsylvania, enacted March 28, 1814, which, in substance, provided that where the officers or privates of the militia of that state who should neglect or refuse to serve when called into actual service, pursuant to any order or request of the president of the United States, the offending persons should be liable to the penalties defined in the act of congress of the 28th of February, 1795, C. 277, or to any penalty which may have been prescribed since the date of that act, and also providing for trial of such delinquents by a state court-martial.

The federal legislation of the 28th of February, 1795, provided for a federal court-martial for the identical acts denounced as offenses by the Pennsylvania statute.

*Here were statutes, both state and federal, denouncing the identical acts as offenses against the respective sovereignties, each providing the same penalties in case of violation of said statutes respectively*, the state statute providing for a state court-martial, the federal statute for a federal court-martial.

*The situation is as closely analogous to the legislation effected by the enactment of section 5509 as can passibly be imagined.*

A prosecution was had under the state statute, before a *state* court martial, resulting in a conviction and the infliction of a punishment thereunder, and by due proceedings the validity of such conviction came before this court for determination. It was urged by counsel for the convicted persons that congress, having fully legislated upon the subject-matter, the state had no jurisdiction to pass the statute under which the court martial was held and conviction had, and further, that to permit the prosecution by the state authorities, under the circumstances, admitted of double punishment for the same act or offense.

The opinion of the court was delivered by Mr. Jusice Washington. On page 28 of the opinion he tersely states the legal problem involved thus:

"What, then, is the real object of the law of Pennsylvania which we are considering? I answer, to confer authority upon a state court martial to enforce the laws of the United States against delinquent militiamen, who had disobeyed the call of the president to enter into the service of the United States; for, except the provisions for vesting this jurisdiction *in such a court*, this act is, in substance, a re-enactment of the acts of congress, as to the description of the *offense*, the nature and extent of the punishment, and the collection and appropriation of the fines imposed."

The court thereupon proceeded to announce its reasons for arriving at the conclusion that both the state, as well as the United States, might constitutionally enact such legislation, the one original, and the other by way of re-enactment or adoption.

In answer to the objection of double punishment, or the double trial for the same acts, the one by a state, and the other by a federal court martial, the court, on page 31, observed:

"It was contended that if the exercise of this jurisdiction (co-ordinate state and federal) be admitted, that the sentence of the court would either oust the jurisdiction of the United States court martial or might subject the accused to be tried twice for the same offense. To this I answer, that, if the jurisdiction of the two courts be concurrent, the sentence of *either* court, either of *conviction* or *acquittal*, might be pleaded in bar of the prosecution before the other, as much so as the judg-

ment of a state court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause instituted in a Circuit Court of the United States."

That the court here meant exactly what its language implies, and nothing less, is borne out by the text in Kent's Commentaries, volume 1, star page 399 (12th Ed.), where, in commenting on the case of Houston vs. Moore, the learned commentator says:

"The Supreme Court having thus declared the true foundation and extent of the concurrent jurisdiction of the state courts in *criminal* cases, proceeded to meet and solve a difficulty occurring on this subject of concurrent jurisdiction, whether the sentence of one jurisdiction would oust the jurisdiction of the other. The decision on this point was that the sentence of *either* court, whether of *conviction* or *acquittal*, might be pleaded in bar of the prosecution before the other; as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, might be pleaded in bar of an action for the same cause instituted in a Circuit Court of the United States."

This court, in the case of U. S. vs. Pirates, 5 Wheat., 184, 197, in a unanimous opinion, delivered by Mr. Justice Johnson, considered the effect of a judgment of a court of concurrent jurisdiction of one sovereignty as a bar to a further prosecution in a court of another sovereignty for an offense against either, such as piracy, saying, on page 197:

"Robbery on the seas is considered as an offense within the criminal jurisdiction of *all* nations. It is against *all*, and punished by *all;* and there can be no doubt that the plea of *autrefois acquit* would be good in any civilized state, though resting on a prosecution instituted in the courts of *any other* civilized state."

Here is another instance where a given crime, *eo nomine*, is an offense against two or more distinct sovereignties, and an acquittal in the courts of one sovereignty, for the commission of such alleged offense, is a valid bar to a prosecution for the like crime, based on the same acts in any other sovereignty.

Chancellor Kent says:

"Piracy is an offense within the criminal jurisdiction of all nations. It is against and punishable by all; and the plea of

*autrefois acquit*, resting on a prosecution instituted in the courts of *any civilized state*, would be a good plea in *any* other civilized state."

Kent's Com., volume 1, page 188.

*Twice, therefore, has this court in principle held* that where a given crime, such as murder, under section 5509, is equally an offense against the United States and the state of Colorado, *the constituents of the offense being identical under each statute*, the trial and acquittal for such alleged offense in the courts of the one sovereignty is *a complete bar* to a prosecution for the like offense, based on the same facts, in the other sovereignty. And in section 985, volume 1, Bishop's Crim. Law (6th Ed.), the text cites the excerpt already quoted from U. S. vs. Pirates, and then adds:

"This proposition results from the same reason as the ordinary common law doctrine of *autrefois convict* and *autrefois acquit*. If one judicial tribunal has brought a person into *legal jeopardy* for an alleged crime, no other will afterward entertain the accusation. And since the courts of the *several* nations take cognizance, each of what the other does, in things which *concern all*, the case must be the same in whatever country the *jeopardy* arises."

Again, in section 984, *id.*, the learned author states:

"Not often is the same act an offense against the criminal laws of two countries. Yet it may be, as, for example, where the party, in a foreign country, is one of our citizens, and our law is extended over him, while the law of the place contains the same inhibition with our own. Now, though such a case is not within the *letter* of our Constitution, yet, on general principles of international jurisprudence, as laid down by some writers, if a valid sentence of acquittal or conviction were 'pronounced under the municipal law of the state where the supposed crime was committed, or to which the supposed offender owed allegiance,' it would, in the language of Wheaton, 'be an effectual bar to a prosecution in any other state.'"

And the author sums up, in section 1060, as follows:

"There may be gleaned from the books passages which *seem* to indicate that one act may constitute any number of crimes, for each of which the doer may be prosecuted, and a conviction of one will not bar a prosecution for another. And perhaps, in our complicated system of government, one act

may be an offense against both the United States and a particular state, and both may punish it. But in principle, and according to the better authority, while one act may constitute as many distinct offenses as the legislature may choose to direct, for any one of which there may be a conviction without regard to the others, 'it is,' in the language of Cockburn, C. J., 'a fundamental rule of law that out of the same *facts* a *series* of charges shall not be preferred.' To give our constitutional provision the force *evidently* meant, and to render it effectual, 'the same offense' must be interpreted as equivalent to the same *criminal act*."

These excerpts disclose that Mr. Bishop, after fully considering the dicta which may be found here and there, scattered through the books, which seem to lend countenance to the maintenance of a second trial in the federal court upon the murder charged, declares that nevertheless the *spirit* and true meaning of the constitutional provision, based as it is upon the fundamental principles of the common law, was designed to prohibit, upon purely technical grounds, the carving out of two separate and distinct offenses from one and the same act, and thereby admitting of a double trial or a double punishment in courts of different jurisdictions.

And, as this court held in the Boyd and De Lange cases, *supra*, the *spirit* of the federal Constitution should control, and not the mere letter, with reference to guarantees of personal rights and immunities, and that the court should be liberal in giving full force and effect to such spirit.

In Wharton's Crim. Law, volume 1, section 293 (9th Ed.), the text is in entire accordance with Bishop, and also with the views of the Supreme Court in the Houston and Pirates cases, *supra*, reading:

"Where a particular offense, as an entirety, is cognizable by *two* sovereigns, the *first sovereign* that takes possession of the defendant and undertakes the prosecution of the offense, *absorbs the case*, as a general rule, which action, if bona fide and complete, is *a bar to the action of the other sovereign*."

In In Re Stubbs, 133 Fed., 1012, the following state of facts was involved: A soldier of the regular army of the United States killed a fellow soldier, by shooting him with a

rifle. Pursuant to the 59th article of war, U. S. Compiled Statutes, 1901, page 95, the officers of his regiment delivered the slayer to the civil authorities of the state, where the homicide was committed, for the crime of murder, based upon such killing. He was tried and acquitted in the state court upon such charge. Afterward he was arraigned before a court martial on the *general* charge of conduct prejudicial to good order and military discipline, in violation of the 62d article of war. The *specification* given therein was that the soldier so tried and acquitted did assault, shoot and wound the deceased soldier, *but without charging* that a murder was committed or that the assault was felonious.

The question which was presented to the federal court was whether the acquittal in the state court could be successfully pleaded as a bar to such different charge and specification. The court held that it could not, upon the *specific* ground, however, that whether a murder was or was not committed in the killing, the circumstances connected with and leading up to the assault and shooting might be "prejudicial to good order and military discipline." It also expressly held that the acquittal of the charge of murder in the state court would be a bar to the *like* charge before a federal court martial, the court in that behalf saying (page 1013):

"After having surrendered him to the civil authorities (which they were required to do by the 59th article of war), his military superiors could not lawfully deal with the petitioner for *murder*, *manslaughter*, or a criminal assault, considered as a crime against society in general."

There are several decisions of the state Supreme Courts which refuse to recognize a concurrent jurisdiction of state and federal government to create offenses against each out of one act or transaction, and this upon the ground that the *bare possibility* of a second prosecution for the same alleged criminal act is so abhorrent to the principles of the common law, as well as the genius and spirit of American jurisprudence, that such dual jurisdiction should be denied.

The Supreme Court of Pennsylvania, in Com. vs. Ketner, 92 Pa. St., 372-7, considered the question whether the statutes

of Pennsylvania relative to the crime of embezzlement, notwithstanding the generality of the terms employed, should be construed to embrace an embezzlement by a cashier of a national bank, and in holding that the legislation would not be so extended remarked, on page 377:

"Such legislation (concurrent federal and state) could only produce uncertainty and confusion, as well as a conflict of jurisdiction. In addition, there would be the *possible* danger of subjecting an offender to double punishment, an *enormity* which *no court would permit*, if it had the power to prevent it."

In Com. vs. Fuller, 8 Metcalf, 313 (Mass.), the court had under consideration a penal statute of that state, making it a crime to knowingly have in possession any counterfeit coin, and in answering the objection of the defendant's counsel to the constitutionaality of the act, upon the ground that an offender might be subjected to a double trial and punishment for the same act, once in the state and again in the federal court, said, on page 318:

"The man who commits the crimes runs the hazard under which jurisdiction he may be subjected to punishment. * * * If he were *indeed* liable to be punished *twice* for the same offense, he might well argue against oppression; and the existence of such liability would go far to prove the *unconstitutionality* of the law."

In Harlan vs. People, 1 Douglas Reports (Mich.), 212, a like question on legislation similar to that of Pennsylvania was presented to the Supreme Court of that state for determination, and on page 212 the subject was thus treated:

"The objection is also urged that a conviction in the state court would be no bar to an indictment in the courts of the United States. But if such concurrent jurisdiction in fact exists we apprehent *such conviction would be admitted in federal courts as a bar.* This would follow necessarily from the existence of a *concurrent* jurisdiction, even if it did not come strictly within the provisions of the seventh article of the amendments to the Constitution." (Citing Sarg. Const. Law, 298; Houston vs. Moore, 5 Wheat., 31.)

**This court has expressly recognized that the constitutional provisions here relied upon by us are, in effect, but declaratory**

of the maxims and principles of the common law, and the humane principles represented thereby would be applied and enforced by the federal courts, even though the federal Constitution was silent upon the subject.

In Ex parte Lange, supra, 18 Wall., 163-205, the relation which each of the constitutional provisions here under consideration bears to the rules of the common law was reviewed at length. It was there inter alia said (page 169):

"The common law not only prohibited a second punishment for the same offense, but it went further, and *forbid a second trial* for the same offense, whether the accused had suffered punishment or not, and whether, in the former trial, he had been acquitted or not."

Reference, with approval, is then made to State vs. Cooper, 1 Green (N. J.), 375, where it was said (page 170):

"The law abhors a multiplicity of suits. It is yet more watchful in criminal cases that the crown shall not *oppress* the subject, or *the government the citizen, by unreasonable prosecutions.*"

The opinion in the main case then proceeds:

"These salutary principles of the common law have to some extent been embodied in the constitutions of the several states and of the United States. By Article VII of the amendments to the latter instrument, it is declared that *no fact once tried* by a jury *shall be otherwise re-examined* in any court of the United States than according to the rules of the common law. And by article V that no person shall for the same offense be twice put in jeopardy of life or limb, * * * or be deprived of life, liberty or property without due process of law."

Here we find the court distinctly recognizing the applicability of the provisions of Article VII, hereinbefore commented on, as forbidding a re-trial of a fact in a *criminal* case, where such fact was once tried by a jury in a state court. The court then again refers to the remarks used in the Cooper case, quoting therefrom as follows (page 171):

"Our courts of justice would have recognized and acted upon it (constitutional inhibition of second prosecution), as one of the most valued principles of the common law, *without* any constitutional provision."

Chitty's Crim. Law, volume 1, sections 452-462, is then referred to, where it is declared:

"They both (pleas of autrefois acquit and autrefois convict) depend on the principle that no man shall more than once be *placed in peril* of legal penalties upon the same *accusation*."

In Hawkins' Pleas of the Crown, cited by Mr. Justice Story in U. S. vs. Gibert, supra (2 Sumner, 39), it is said:

"Where a man is once found not guilty on an indictment or appeal * * * well commenced before *any* court which hath jurisdiction of the cause, he may, by the common law, in all cases, plead such acquittal in bar of any subsequent indictment or appeal for the same crime."

And Justice Story, on page 42 of the opinion in the Gibert case, then adds:

"Thus we see that the maxim is imbedded in the very *elements* of the common law, and has been uniformly construed to present an insurmountable barrier to a second prosecution where there has once been a verdict of acquittal or conviction regularly had upon a sufficient indictment."

Concurrent *criminal* jurisdiction between states exists in many instances in this country. Thus, where any of the great navigable rivers, such as the Ohio or Mississippi, forms a boundary line between two or more states, congress, in authorizing the admission of such states into the Union, has uniformly provided that each of the abutting states should possess *concurrent* jurisdiction over the entire width of the river, as to crimes committed thereon, regardless of the fact that the *locus criminis* may have been nearer one bank of the river than the other. Like concurrent jurisdiction as to civil matters has also been conferred by the same legislation.

The Enabling Acts, providing for the admission of Illinois, Missouri, Indiana, Ohio, Kentucky, Minnesota and Wisconsin, are some of the instances creating such character of concurrent jurisdiction.

The effect of such legislation has been considered by the courts of these states on several occasions.

In State vs. Faudre, 54 W. Va., 122, 128, the Supreme Court of West Virginia reviewed the subject at some length, quoting

from Wiggins Ferry Co. vs. Redding, 24 Ill. Apps., 260, where it was, *inter alia*, said:

"The two states (Illinois and Missouri) exercise concurrent jurisdiction on the river (Mississippi) for *all* judicial purposes."

The opinion in the principal case then adds:

"In matters to which this concurrence applies, the state which *first* assumes, retains jurisdiction * * * to the *exclusion* of the other."

See also, State vs. Seagraves, 111 Mo., App. 353, for further discussion on the same subject, and Aitcheson vs. The Endless, etc., 40 Fed., 256, where it is said:

"It has been said by a writer on American international law that it is 'a principle of American public law that, where the middle of a navigable river or lake or bay forms the dividing line of states * * * a *concurrent* jurisdiction, civil and *criminal*, arises over such waters to the states upon the opposite shores.'"

Now suppose a homicide be committed on a craft upon the Mississippi river, where it flows between the states of Illinois and Missouri. Suppose, further, that the statutory designations of the constituent elements of murder and all lesser grades of felonious homicides, and the technical names of such offenses, and the punishment therefor, be all and singular *identical* under the laws of the two states.

Under these conditions, let us further suppose that the perpetrator of the homicide be duly indicted for the crime of murder, say in a court of competent jurisdiction in Missouri, and upon due trial is there acquitted by the jury, and thereupon discharged by the court without day, what principle of law, common or constitutional, would authorize the re-trial of the defendant upon the identical charge of murder in an Illinois court?

The answer must be, none. As we have already shown, under analogous circumstances, the trial and acquittal in a court of concurrent jurisdiction would bar a second prosecution under the principles of the common law. The decision of this court in Houston vs. Moore and the Pirates, *supra*, and

the spirit, if not the letter, of the federal Constitution, would likewise prohibit such second trial.

In the instance suggested, the Missouri court solemnly adjudged that, as a matter of *fact*, no murder, or other grade of felonious killing, had occurred, and this decision binds the world, and, as it is essentially a judgment *in rem*, it finally determined the status of a thing, viz., the character of the homicide.

In a sense, it may be fairly said that each state (possessing such concurrent jurisdiction) is the representative of the other, to adjudge and determine whether a crime, common to the criminal code of each, has or has not been committed within the territory over which both states possess concurrent authority.

And it was explicity recognized by the Supreme Court of Indiana, in Carlisle, et al. vs. State, 32 Ind., 55-61, that a trial and acquittal or conviction for murder, in a court of one state, would bar a prosecution for the same homicide in the courts of another state under the above stated conditions.

In no instance in the history of state criminal jurisprudence has the attempt been ever made to subject a citizen to double prosecution under the circumstances above stated.

In short, where such concurrent jurisdiction exists, and where the statute supposed to be violated *is in all essential particulars*, the same in each state, a trial and judgment of acquittal in one state, upon settled principles of common, international and constitutional law, and the comity existing between courts of co-ordinate authority, will bar a second prosecution in the other.

In principle, the illustration and reasoning above set forth apply with full force to the *facts* in the case at bar.

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## VI.

**Review of cases in the federal courts where remarks exist seemingly countenancing the right to maintain a second prosecution for the same alleged criminal act.**

The first cause decided by this court in which any remarks may be found apparently countenancing the idea of a concur-

rent power to try and punish both by the state and federal governments for offenses founded upon the same criminal act or transaction, is that of Fox vs. Ohio, 5 How., 410. A brief statement of the precise questions involved therein, and of the legal propositions presented to the court for its decision, will now be given.

The case reached this court on error from the final judgment of the Supreme Court of Ohio.

The plaintiff in error had been indicted and convicted in the state court for passing and uttering counterfeit coin. The ground upon which a reversal was sought, as set out in the statement of the case by the court was "that the courts of that state (Ohio) had no jurisdiction of the offense charged in the indictment, but that the jurisdiction belongs exclusively to the courts of the United States."

And in the body of the opinion of the court, delivered by Mr. Justice Daniel, the same proposition was restated in these words (page 432):

"The only question with which it (Supreme Court of United States) can regularly deal in this case is the following, viz.: Whether *that portion* of the statute of Ohio under which the prosecution against the plaintiff has taken place, and, consequently, whether the conviction and sentence founded on the statute are consistent with or in contravention of the Constitution of the United States, or of any law of the United States enacted in pursuance of the Constitution."

The court then proceeds to draw the distinction between the offense of *counterfeiting, per se*, and the offense of *passing* the spurious coin, and held that the two offenses were essentially different in their character (page 433), saying:

"The former (counterfeiting) is an offense directly against the government by which individuals may be affected; the other is a *private* wrong, by which the government may be remotely, if it will in any degree, be reached."

The pith of this holding is, in effect, that the offense of counterfeiting, of which the federal government possessed undoubted constitutional power to punish, and which was primarily the only ground upon which it was authorized to enact penal legislation to prevent, was an *essentially different* crime

from the one upon which the plaintiff in error had been tried and convicted in the state court, to wit, that of *passing* counterfeit coin. In other words, the passing or uttering of such coin would be in the nature of a cheat practiced upon private individuals.

On the subject of double prosecution for offenses connected with the counterfeiting or passing of counterfeit coins, in the state and federal courts, the court, *purely arguendo*, used the following language (434):

"Conceding, for the present, that congress should undertake and could rightfully undertake to punish a cheat perpetrated between citizens of a state because an instrument in effecting that cheat was a counterfeited coin of the United States, the force of the objection sought to be deduced from the position assumed is not perceived."

Then follow remarks to the effect that the prohibition of the federal Constitution against second jeopardy was a limitation upon the powers of the federal government, and not upon those of the state.

It will be observed that the court did not have a case before it in which it was required or called upon to decide whether a double prosecution for the same criminal act could be maintained, one in a federal and the other in a state court. Indeed, the opinion assumes that there was no legislation in existence out of which such double prosecution could possibly be maintained. Its remarks (concerning double trial) were, therefore, purely gratuitous in that behalf, and lack all the essentials of an authoritative holding. But that the court did not mean, by its obiter statement, to recognize that a subsequent prosecution could be lawfully maintained in either a state or a federal court, where there had been, in *fact*, a previous *trial* and *acquittal* or conviction, is rendered perfectly clear by what is said toward the close of the opinion, where the following words appear (page 435):

"It is almost certain that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one *would not* be *subjected* a *second time* to punishment by the other for *acts essentially the same*, unless,

indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor."

A vigorous dissenting opinion was filed by Mr. Justice McLean, in the course of which he said (439):

"To punish the same act by the two governments would violate not only the *common principles of humanity*, but would be repugnant to the nature of both governments. If there were a concurrent power in both governments to punish the same act, a *conviction* under the law of either *could be pleaded in bar* to a prosecution by the other. * * *

"There is no principle better established by the common law, none more fully recognized in the federal and state Constitutions, than that an individual shall not be put in jeopardy twice for the same offense. This, it is true, applies to the respective governments; but its spirit applies with equal force against a double punishment, for the same act, by a state and the *federal* government. * * *

"Nothing can be more repugnant or contradictory than two punishments for the same act. It would be a mockery of justice, and a reproach to civilization. It would bring our system of government into merited contempt. * * * As there can not, in the nature of things, be two punishments for the same act, it follows that, the power to punish being in the general government, it does not exist in the states."

Mr. Justice McLean then adds that Mr. Justice Story coincided with the views thus expressed.

A careful reading of the majority and minority opinions will disclose that there was a practical unanimity upon the question of whether there could be a double punishment, one in the state and the other in the federal court, for the same criminal act upon which the respective penal statutes of the state and federal governments might be based; both concurring that this would not be tolerated, the difference among the judges being on the question as to whether the state courts possessed *any jurisdiction at all* to try and punish under the circumstances there presented.

The next case, in point of order, is U. S. vs. Marigold, 9 How., 560. The question there presented was whether congress possessed the constitutional power to provide for the punishment of persons bringing into the United States, with intent

to pass the same, any false, forged or counterfeit coin, and also punishment for the passing of the same.

In holding that congress was vested with jurisdiction in the premises, the court referred to the Fox case, supra, and remarked:

"That case was simply a prosecution for a *private cheat*, practiced by one citizen of Ohio upon another, within the jurisdiction of the state, by means of a base coin, in the similitude of a dollar."

The question of the right of the state and federal governments to respectively prosecute and punish for the same criminal act was not discussed.

The net result of these two cases was a holding that the state government could punish the "passing" of counterfeit coin, and that the federal government would possess the incidental power of penalty prohibiting like acts, as *ancillary* to the main offense of "counterfeiting." But in neither case was the court called upon to decide, nor did it decide, whether, if a citizen should be tried in a state court for the offense of *passing* counterfeit coin, and was there *acquitted*, that he could be again tried for the identical passing of such coin, in a prosecution based upon the federal statute.

The next case, in point of order, is Moore vs. Illinois, 14 How., 13. The plaintiff in error in that case was convicted in a state court of Illinois for "harboring and secreting a negro slave," said acts being made penal by a statute of that state.

The ground upon which the plaintiff in error based his contention that the judgment of conviction should be reversed was that the state legislation on the subject was in conflict with the federal statute, relative to fugitive slaves, and in addition that, under the Constitution of the United States, the entire power to legislate upon the subject-matter was *exclusively* vested in congress.

In answer to these contentions, the court proceeded to point out that the state penal statute did not cover the *same field* as the congressional legislation, that not only were the crimes denounced by each government in the premises *different* in *name* and *characteristics*, but the acts necessary to constitute

a violation of either were not identical, saying in this connection (page 19):

"It has been urged that this act is void, as it subjects the delinquent to a double punishment for a single offense. But we think that neither the *fact* assumed in this proposition nor the *inference* from it will be found to be correct. The offenses for which the 4th section of the act of 12th of February, 1793 (federal statute) subjects the delinquent to a fine of $500 *are different in many respects from those defined by the statute of Illinois.*"

The court then specifically pointed out the important differences between the nature and characteristics of the crimes respectively created by such state and federal legislation, and held that an indictment under the state statute would not charge sufficient facts to bring the offense within the congressional act, and vice versa.

The court might well have stopped at this juncture, but it proceeded to indulge in what we believe we are justified in characterizing as extra-judicial utterances, because, having once held, as it did, that the *acts* necessary to constitute an offense under the state law would not suffice to create a crime under the congressional act, there was no room or occasion for the discussion of the question of double trial or double punishment. But even the obiter statements of the court can not be used to our disadvantage in the present instance when they are carefully read and considered. In this connection the court remarked (page 20):

"The same act may be an offense or transgression of the laws of both. Thus, an assault upon the *marshal* of the United States, and *hindering him* in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross *breach of the peace* of the state, a *riot*, *assault* or *a murder*, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish *such* an offender can not be doubted."

Let us analyze these statements.

The court states what is undoubtedly true, that, by one and the same transaction, two different characters of offenses may

be perpetrated. In the illustration given the same unlawful conduct might amount to a criminal interference with the discharge of the duties of a United States marshal, and such interference might result in the felonious killing of the marshal. The latter act would constitute an offense against the state, the former an entirely different character of offense against the United States.

It will be seen that in the Moore case the court's attention was not directed to nor was it thinking of a double prosecution of the character now involved in the pending indictment, and therefore nothing said in that case can be properly regarded as authority in the present instance.

Mr. Justice McLean again dissented, for the same reasons as expressed by him in the Fox case, expressing his views in the latter dissent in these words:

"It is true the criminal laws of the federal and state governments emanate from different sovereignties, but they operate upon the same people, and should have the same end in view. In this respect the federal government, though sovereign within the limitation of its powers, may, in some sense, be considered as the agent of the states to provide for the general welfare, by punishing offenses under its own laws within its jurisdiction. It is believed that no government, regulated by laws, punishes twice criminally the same act. * * *

"It seems to me it would be as unsatisfactory to an individual as it would be illegal to say to him that he must submit to a second punishment for the same act, because it is punishable as well under the state laws as under the laws of the federal government. It is true he lives under the ægis of both laws, and, though he might yield to the power, he would not be satisfied with the logic or justice of the argument."

In the subsequent case of Ex Parte Lange, *supra*, already quoted from, the dissent of Mr. Justice McLean, in the Moore case, is referred to and his views there expressed seemingly adopted in the following language:

"But it was also urged (in Moore case) that the party might be subjected to punishment twice for the same offense if liable to be prosecuted under statutes of both state and national legislatures. In regard to this *Judge McLean said*, in a dissenting opinion, that 'the exercise of such a power by the states would be, in effect, *a violation* of the Constitution of the United States and of the respective states. They all provide against a second punishment for the same act. It is contrary,' said he, 'to the nature and genius of our government to permit an individual to be twice punished for the same act.'" (18 Wall., page 172.)

This excerpt from Judge McLean's dissent, taken in connection with the text of the opinion in the Lange case, furnishes indubitable evidence that, upon the question of double punishment or double trial, the court in the latter case accepted the views expressed in such dissent as being sound law.

The next case in order is Ex Parte Siebold, 100 U. S., 371. There the petitioner was indicted in the Circuit Court of the United States for the District of Maryland, and charged with the violation of section 5522 of the United States Revised Statutes, in that he and others indicted with him had unlawfully interfered with and obstructed election officers in the discharge of their duties at an election whereat members of congress were being voted for, and that they had also illegally obstructed the discharge of the duties of a deputy marshal in connection with the holding of such election.

The contention of the defendant was that the federal government was without jurisdiction to punish the acts charged in the indictment, the state alone, as claimed, being the sole authority in that behalf.

The court, in a lengthy discussion, proceeded to show that a dual jurisdiction over the holding of such election might be exercised by both the state and federal government—by the state in so far as it related to the election of state officers, by the United States in so far as it pertained to votes cast or intended to be cast for a member of congress—and therefore that different

offenses might be committed, one against the state and the other against the federal government, in unlawfully interfering with the holding of such character of election, and general reference is made to the Fox, Marigold and Moore cases, *supra*. But that the court did not intend to decide that a double prosecution or punishment might be maintained or had in both the state and federal courts, even under such circumstances, is made evident from the remarks to be found on page 389 of the opinion, where it is said:

"Where a person owes a duty to two sovereigns he is amenable to both for its performance, and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same *identical act* need not now be decided."

Here we find the court distinctly committing itself to the proposition that it was not there deciding, and by clear inference that it had not theretofore decided, that such double prosecution could be maintained.

The same non-committal position on the pivotal question in hand is shown by the remarks of the court in Ex Parte Mason, 105 U. S., 699, where one of the questions involved was whether for the same criminal acts the perpetrator might be tried by the civil authorities of the state and also by a federal military court martial, the court remarking, with reference to the question in hand, as follows:

"He has offended both against the civil and military law * * * Whether, *after* trial by the court martial, he can be again tried in the civil courts is a question *we need not now consider*."

The next case in chronological order, in which the subject in hand was in anywise referred to, is that of Cross vs. North Carolina, 132 U. S., 131.

A conviction was there had in the state court, which was removed on error to this court. The offense for which the plaintiff in error was indicted in the state court was the charge of having feloniously counterfeited a certain promissory note, contrary to the statute of the state of North Carolina in such case made and provided.

A plea in abatement was filed in the state court, contesting its jurisdiction, the substance of which was that the defendant (plaintiff in error Cross), at the time of the commission of the alleged forgery, was an officer, to wit, president of a designated *national* bank, doing business in the city of Raleigh, N. C.; that the purpose of committing the forgery set out in the indictment was to enable said Cross, assisted by another officer of the bank, to make a certain false entry in the books of the bank, with reference to said forged note, such forgery and false entry being designed to deceive the bank examiner of the United States, in the matter of the financial condition and assets of such bank, and that such *false entry* was specifically created a crime by the provisions of the national banking act; and in as much as the forgery was intended to be an adjunct to the false entry, such act became merged in or absorbed by the false entry made in the books of the bank, and therefore rendered the *entire transaction exclusively cognizable* in the federal courts.

Mr. Justice Harlan, speaking for this court, very properly said that the *federal* offense, relied upon by Cross, under section 5209, in nowise involved the crime of *forgery*, for which the defendant was indicted in the state court; that the federal offense could have been committed, though no forgery had been perpetrated.

The court also held that the crime of forgery, charged in the state indictment, was not, per se, an offense cognizable in the federal courts, saying:

"We do not think that the crime of which the defendants were found guilty is within either the words or scope of section 5418 (federal section relied upon by defendants as punishing the specific crime of forgery charged in the state indictment)."

Reference is then made to the Fox, Marigold and Moore cases, as supporting the doctrine that the same act may constitute an offense, equally against the United States and the state, and subject the guilty party to punishment under the laws of each.

But it will be observed that the court held that the sole acts for which the defendants were indicted in the state court, to wit, forgery, did not, per se, constitute any crime whatsoever against the United States; that it was the subsequent and *additional*

acts, to wit, the making of false entries in the books of the bank, which alone constituted a federal crime, and the defendants were not charged with making such false entries by the indictment in the state court. Hence, they were not only two different and distinct characters of offenses, so far as state and federal jurisdiction was concerned, but, in addition, they were separate and distinct acts, out of which the respective offenses arose.

The next case in which any notice is taken of the point under consideration is that of Pettibone vs. U. S., 148 U. S., 197, in which reference is made to Cross vs. North Carolina, followed by these words (page 209, 148 U. S.):

"But here we have two offenses, in the character of which there is *no identity*."

Crosley vs. State of California, 168 U. S., 640, is the next case in point of order.

There the defendant had been tried and convicted in a state court of California for the crime of murder of one Clark, committed by derailing a U. S. mail train, of which the latter was the engineer, and the contention of the defendant was that because the murder resulted from the derailment of a *federal* mail train, ergo, he was criminally accountable only to the federal tribunals and not the state.

The manifest absurdity of such contention consisted in the fact that so far as a charge of murder was concerned, under the circumstances stated, there was no federal statute in existence giving a United States court jurisdiction to punish therefor. The court curtly disposed of the contention without discussion, by merely referring to some of its previous decisions, already cited.

The last utterance of this court upon the subject in hand will be found in Grafton vs. U. S., 206 U. S., 333. The precise question involved in that case was whether a civil court in the Philippines could lawfully try a private soldier for murder, after he had been once tried and acquitted by a court martial upon the same charge, and the court held that such second trial could not be had, upon the distinct ground that the acquittal by the court martial would be a bar to a prosecution in the civil courts for the same offense.

In that case the court saw proper to rest the ground of its decision upon the proposition that the civil courts of the Phil-

ippine Islands, as well as the court martial in question, both derived their authority directly from the United States, and reference was then made to the Fox case, and some of the others already cited, to show that nothing which was decided in the Grafton case should be regarded as conflicting with the views previously announced.

We have now reviewed, in extenso, the remarks to be found in every opinion of this court, where the particular topic in hand was discussed, obiter or otherwise, and from them it is manifest that the only *decision* which has ever been made by this court in the premises amounts to this and nothing more.

A. That where *concurrent* jurisdiction exists between the state and federal governments, to create and punish criminal offenses, and where the state and the federal statutes, respectively, carve out a different and distinct class of offense from the same act or series of acts, that the courts of either jurisdiction may try, punish or acquit, and *possibly* that in such case a conviction or ecquittal in the one court *may not* be pleaded in bar in the other.

B. But where the same act constitutes the identical crime, both in *fact, as well as name*, where all the essentials of the crime are the same, in either tribunal, and a like punishment is provided by the laws of the two sovereignties, then, and in such case, the judgment of the court that first assumes lawful jurisdiction of *such* crime, whether of conviction or acquittal, is a bar to a second prosecution in the courts of the other sovereignty.

The conclusions thus stated reconcile all apparently conflicting statements to be found in the various opinions of this court. They avoid any repugnancy between the doctrine announced in Houston vs. Moore, and in the case of the Pirates, *supra*, with the remarks employed in the later cases. Especially is this so when we bear in mind that in two instances, viz., *Ex parte Siebold and Ex parte Mason*, *supra*, the court distinctly refused to commit himself to the proposition that a second prosecution in a federal or state court could be maintained where there had been, in *fact*, a previous acquittal or conviction in the courts of the other sovereignty.

Suffice it to say that *this court has never, in fact, upheld a second prosecution in a federal court, where the acts constituting the crime charged in the latter formed the basis of an offense previously tried in a state court.*

There remain for consideration the remarks employed by a federal inferior court in a prosecution where the defendants charged with the same crime had been previously tried and acquitted in a state court. That is the case of U. S. vs. Barnhart, 22 Fed., 285, id.; 10 Sawyer, 491: There, the defendants, who were *white* men, had been previously indicted in a state court of the state of Oregon for the killing of one William, a *member* of the Umatilla tribe of *Indians*, the killing having occurred on the *Umatilla Indian Reservation*, within the limits of the state of Oregon, and upon trial in the state court the defendants were acquitted.

Thereafter the same defendants were indicted for the crime of manslaughter in the killing of the same Indian, at the time and place mentioned in the state indictment.

The plea of former acquittal, which was interposed in bar to such prosecution in the federal court, was held bad, but upon the precise ground of *want of jurisdiction in the state court*, the court (page 289, 22 Fed.) saying:

"But as this subject of the intercourse between the white man and the Indian is committed by the Constitution to the government of the United States, and as congress has provided for the punishment of a white man for the felonious killing of an Indian upon this reservation, and *vice versa*, it is not admitted that the state has *any authority* over such killing or power to punish or *absolve* the person committing the same."

This was a distinct holding that the *state court* was wholly *without jurisdiction* to try, convict or *acquit* a white man for the alleged felonious killing of an Indian, a member of a tribe holding treaty relations with the federal government, and especially where the killing occurred within the limits of the Indian reservation.

That this holding was sound law is distinctly recognized by various decisions of the Supreme Court of the United States.

Thus, in Worcester vs. Ga., 6 Peters, 580, Mr. Justice McLean said:

"By the Constitution the regulation of commerce among the Indian tribes is given to congress. This power must be considered as *exclusively* vested in congress."

And in U. S. vs. Kagama, 118 U. S., 383, the Supreme Court decided:

"These Indian tribes are the wards of the nation, dependent on the United States; * * * they owe *no allegiance to the states* and receive from them no *protection*."

District Judge Deady, who delivered the opinion in the Barnhart case, was, therefore, correct in holding that the former acquittal in the state court was absolutely void for want of jurisdiction of that court to try the offense of a felonious killing of a tribal Indian by a white man within the limits of an Indian reservation, and there the learned judge should have stopped. But he saw fit to enter upon a dissertation of the general subject of concurrent jurisdiction between state and federal courts, and the effect of prosecutions in either, and in so doing not only had he no case or controversy pending before him that required or called for such disquisition, but, in addition, failed to properly discriminate between *variant* and *identical* crimes growing out of the same act or transgression.

The Barnhart case is referred to in a note to Wharton's Crim. Pl. and Pr., page 308, in the following words:

"In U. S. vs. Barnhart, 10 Sawyer, 491, it was held that a former acquittal in a state court of killing an Indian on an Indian reservation was not a bar to a prosecution in a federal court. This, however, can *only* be sustained on the ground that the state court had no jurisdiction."

That case merits no further notice at our hands.

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## VIII.

**Obiter remarks contained in any or all of the opinions last reviewed, which seemingly lend color to the idea of a double prosecution for the identical crime, are not authoritative or binding.**

We have shown, as we think, conclusively that this court *has never decided*, and has never been called upon to decide, that, after a trial and acquittal in a state court for an alleged

offense over which the federal courts possessed either concurrent or qualified concurrent jurisdiction, that the acquittal in the state court would not be a bar to a further prosecution for the same offense in the federal court.

We will now cite authorities in favor of the proposition that any remarks found in the opinions cited which, taken *literally*, would seem to warrant such subsequent prosecution, do not constitute a rule of law for any court, state or federal.

Chief Justice Marshall, in Cohen vs. Virginia, 6 Wheat., 264, 399, *inter alia*, said:

"It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the *case* in which those expressions are used. If they go *beyond* the *case* they may be respected, but ought not to control the judgment in a subsequent suit when the *very point* is presented for decision."

See, also,

Ex parte Christy, 3 How., 292, 322.
Ogden vs. Saunders, 12 Wheat., 213, 332.
Carroll vs. Carroll, 16 How., 275, 287.
McCormick, Etc., vs. Aultman, 169 U. S., 606, 611.
Bardes vs. Bank, 178 U. S., 524, 534.
Plumley vs. Mass., 155 U. S., 461.

In Flint vs. Chaloupka, 72 Neb., 34, 37, the Supreme Court of Nebraska, in this connection, trenchantly observes:

"It is not so much what a court *says* in the decision of a case, as that which it actually *does*, that should be considered in applying the principles of the case as a precedent. Courts often use language in an opinion *responsive to an argument of counsel*, of which the reader of the opinion is not cognizant, and thus general statements are given undue weight."

In Thornton vs. Lane, 11 Ga., 500-1, Judge Lumpkin, with rare felicity of diction, discoursed thus:

"The inquirer after judicial truth is at liberty to range through the whole field of legal learning; to explore the decisions of the American courts—British and other foreign tribunals, the opinions of majority or minority judges * * * examining the whole without fear, retaining what is applicable to truth and justice, and rejecting what is not. * * *

"In cases which are *authority*, we must look alone to the *principle* of the decision, for that *alone* is *law*. And any expression of opinion by the judge in such case is *obiter dictum* only."

Further comment or citation of authorities in respect to the matter under consideration is needless. In the light of the settled principles applicable to general terms found in any judicial opinion, we are warranted in saying that no *authoritative* holding exists in federal jurisprudence which in anywise militates against the efficacy of the plea of former acquittal in bar of the pending prosecution for murder.

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## X.

**Conceding that congress possesses the abstract power to vest the federal court of the district of Colorado with jurisdiction to re-try the defendants upon the murder charge contained in the indictment, it has never in fact clothed such court with such authority, and section 5509 should not receive a construction to that effect.**

Let it be taken for granted that congress might have authorized the federal District Court of Colorado to re-try the defendants upon the identical charge of murder for which they were once duly tried and solemnly acquitted by the judgment of a state court of competent jurisdiction, we now insist that it has never enacted legislation which, in legal contemplation, clothed it with such power.

The authority to re-try these defendants in said court upon the charge of murder exists, if at all, solely by virtue of the provisions of section 5509, U. S. R. S. That section is *silent* upon the question of whether a re-trial of an offense, said to have been committed in the carrying out of the conspiracy in violation of section 5508, may be had in a federal court, after a trial and acquittal upon the same charge has occurred in the state court.

As that section (5509) *does not in terms sanction such double trial*, the question becomes one of statutory construction, and the question therefore squarely presents itself whether this court should attribute to congress in its enactment an *intention* to authorize such re-trial in this court.

Upon this point we insist that the settled maxims and canons of statutory construction require that a negative answer should be given to such query.

In Black on Int. of Law, section 46, the text reads:

"In construing statutes it is not reasonable to presume that the legislature intended to violate a settled principle of *natural justice*. * * * Courts, therefore, in construing statutes, will always endeavor to give such an interpretation to the language used, as to make it *consistent with reason* and *justice*."

In U. S. vs. Kirby, 7 Wall., 482, this court, speaking through Mr. Justice Field, said:

"*All* laws should receive a sensible construction. *General terms* should be so *limited* in their application as to not lead to *injustice*, *oppression* or an absurd consequence. It will always, therefore, be presumed that the legislature *intended exceptions* to its language which would *avoid* results of *this character*."

In Heydenfelt vs. Daney, etc., Co., 93 U. S., 638, the court again said:

"If a literal interpretation of any part of it (statute) would operate *unjustly*, or lead to absurd results * * * it should be *rejected*."

In Carlisle vs. U. S., 16 Wall., 147, Mr. Justice Field, again speaking for the court, said:

"All general terms in statutes should be limited in their application, so as not to lead to *injustice*, *oppression*, or any unconstitutional operation, if that be possible. It will be *presumed* that *exceptions* were intended which will avoid results of *that nature*."

In Lau Ow Dew vs. U. S., 144 U. S., 47, 59, 61, Chief Justice Marshall, speaking for the court, said:

"Nothing is *better settled* than that statutes should receive a sensible construction, such as will effectuate the legislative intent, and, *if possible*, so as to avoid *unjust* or absurd *conclusions*."

And on the latter page the opinion adds:

"All laws are to be construed so as to avoid an *unjust* or an absurd conclusion, and general terms are to be so limited in

their application as not to lead to *injustice, oppression* or an absurd consequence."

In Carrigan vs. Stillwell, 99 Me., 434, 437, the court said:

"The results of any particular construction are to be anticipated, and if such results will be anomalous, *unjust* or inconvenient, it is a legitimate and strong argument against the construction contended for. It will be presumed that the legislature did not intend any such results."

A cognate principle to the one under consideration is that a construction will never be given a statute which will derogate from or conflict with the principles of the common law, unless the language of the act will admit of no other interpretation.

This doctrine is forcibly expounded in Bishop on Int. of Stats., page 152, as follows:

"It is in the last degree improbable that the legislature would overthrow *fundamental principles*, infringe rights, or depart from the general system of law, without expressing its intention with *irresistible clearness;* and to give any such effect to general words, simply because, in their widest and perhaps natural sense, they have that meaning, would be to give them a meaning in which they were not really used."

On page 173 it is further said:

"Statutes are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare."

In Smith et al. vs. Laatsch et al., 114 Ill., 279, the court quoted with approval from Potter's Dwarris on Stats., page 185, where it is said:

"As a rule of exposition, statutes are to be construed in reference to the *principles* of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case *absolutely* required."

And in Cooley's Const. Lim. (7th Ed.), page 240, the text reads:

"It (spirit of Constitution taken in connection with the common law) also affords a safe rule of construction for courts, * * * to presume that the legislature could not have intended an unequal and *unjust* operation of its statutes. Such a

construction ought never to be given to legislative language, if it be susceptible of any other more conformable to justice."

Taking this mass of authority, in connection with the familiar rule that penal statutes are to be construed most strictly against the government and favorably for the defendant, the application of the principle under consideration to the provisions of section 5509 becomes clear and unmistakable.

We have shown that the sages of the common law concur in condemning a second penal prosecution based on acts identical with those upon which the first was founded. We furthermore find this court repeatedly recognizing that it is not only unjust, but *abhorrent to the humane principles of the common law*, that such second prosecution should be tolerated where an acquittal had been adjudged in a court of competent jurisdiction.

The primal instincts of civilized mankind revolt at the idea that such double prosecution should be maintained regardless of the astute, specious distinction that one act may constitute distinct crimes against two or more sovereignties triable and punishable by all.

That such proceedings would be unjust, in the most extreme sense of the term, goes without saying. Hence, for this court to hold that though section 5509 does not in terms clothe the trial court with the power to re-try these defendants upon the murder charge, it should nevertheless receive a judicial construction to that effect, would be giving the statute an oppressive, unjust operation. Law writers and courts, as has been shown, unite in declaring that the general terms of any statute should never be applied to either an unjust or an oppressive end.

We, therefore, respectfully, yet firmly, insist that no adequate statute exists vesting the trial court with the power to reinvestigate herein the murder charge contained in the indictment, even though it be conceded, without qualification, that congress may possess the power to have clothed it with such character of jurisdiction.

Suffice it to say that congress has never in terms conferred upon the federal courts such unjust and oppressive jurisdic-

tion, and until it says so in unmistakable terms, no federal court should exercise it, for by so doing it would act not only in violation of the settled principles of the common law, but in derogation of the instinctive judgment of humanity.

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## XI.

**The defense of former acquittal rests upon principles radically differing from those upon which the doctrine of RES JUDICATA is based.**

The plea of res judicata in a *civil* action is not identical in principle with that of autre fois acquit in a criminal prosecution, and what are indispensable requisites of the one plea are not matters of essence in the other.

A brief discussion will suffice to make clear the vital distinction between these defenses, though, on first impression, it might seem that the essentials of either plea are the same.

Upon the theory that the plea of *res judicata* and former jeopardy are alike in their constituent elements, it may be urged that as one of the requisites of the former plea is identity of parties, the latter defense should be here deemed ineffective, because the plaintiff or prosecutor in the state court, upon the murder charged, was the state of Colorado, while the United States is the plaintiff here, upon the same accusation.

Lack of identity of parties plaintiff in the two prosecutions, by such process of reasoning, would operate to defeat the plea of former acquittal.

But the premise upon which such contention must rest is untenable.

The defense of *res judicata* is exclusively applicable to *civil* suits, and is bottomed upon the doctrine of *estoppel*. The defenses of *autrefois* convict, *autrefois acquit*, and of former jeopardy, rest upon weightier principles, in furtherance of personal liberty, and either of the latter pleas is available and efficasious under circumstances and conditions which, by analogy, would render the plea of *res judicata* a nullity.

To illustrate: A *verdict* in a civil case, in favor of a defendant in a suit, but not followed by final judgment thereon,

will not bar a second suit between the same parties for the same cause in action.

In Smith vs. McCool, 16 Wall, 560, Mr. Justice Swayne, speaking for all the judges, stated:

"A verdict without a judgment, in a case like this (civil suit), if of no validity, either as an *estoppel*, or as *evidence*. Reed vs. Proprietors, Etc., 8 How., 291; 2 Bibb., 60; 3 Bouv. Inst., 376. To give efficacy to a verdict, general or special, it must be followed by a judgment, and when offered to establish any fact, such act must have constituted, in whole or part, the foundation of a judgment which *was rendered.*"

One other authority will suffice in this particular.

In volume 24, A. & E. Ency. of Law (2d Ed.), page 792, in treating the subject of *res judicata*, the text reads:

"The weight of authority supports the view that it is not the finding of the court or the verdict of the jury, rendered in an action, that concludes the parties in subsequent litigation, but the *judgment* entered thereon. For the verdict, when rendered, is under the control of the court in which the action was tried, and may be set aside for good reasons, and hence it is necessary, in order to support the plea of *res judicata*, that a *judgment*, decree or final order should have been *actually entered* in the prior action or suit."

The very reverse of the rule thus announced holds good in a criminal case. A *verdict* of acquittal, though no judgment be ever rendered thereon, will bar a second prosecution for the same crime upon which such verdict was returned.

In Kepner vs. U. S., 195 U. S., 100, 130, Mr. Justice Day, delivering the opinion of the court, on the latter page, said:

"However it may be in England, in this country a *verdict* of *acquittal*, although not followed by any *judgment*, is a bar to a subsequent prosecution for the same offense. U. S. vs. Sanges, 114 U. S., 310; Com. vs. Tuck, 20 Pick., 356-65; West vs. State, 22 N. J. L., 212-231; 1st Lead. Crim. Cas., 532. It is then *the settled law of this court* that *former jeopardy* includes one who has been acquitted by a *verdict* duly rendered, although *no judgment* be entered on the verdict, and it was founded upon a *defective* indictment. The protection is not, as the court below held, against the peril of second punishment, but against being *again* tried for the same offense."

Again, if a jury be impanelled to try the issues in a *civil* suit, the plaintiff may dismiss the action at any time before final submission to the jury, and he may thereafter bring and maintain a second suit against the same defendant, and for the identical cause of action involved in the first suit.

But one of the multitude of cases upon this subject need be quoted from.

In Manhattan, Etc., vs. Broughton, 109 U. S., 124-5, the court said:

"A judgment of non-suit does not determine the rights of the parties, and is no bar to the new action. 16 How., 354. A trial upon which nothing was *determined* can not support a plea of *res judicata* or have any weight as *evidence* at another trial."

To the same effect see Greenleaf's Ev., section 535.

Not so, however, in a criminal case. The constitutional guaranty against second jeopardy prohibits a second trial, though in the first prosecution neither *verdict* nor judgment are returned or rendered. Thus, if a jury be regularly impanelled and sworn in a criminal case, and *before verdict* the prosecuting officer enters a *nolle prosequi*, without the consent of the defendant, or if the court should discharge the jury before verdict, for some invalid reason, no second prosecution or trial can ever afterward be maintained against the accused for the same crime.

In Cooley's Const. Limitations, page 467, the text runs:

"A person is *in legal jeopardy when* he is *put upon trial*, before a court of competent jurisdiction by an indictment or information, which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impanelled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution, and he can not be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will, or by a *discharge* of the *jury* and continuance of the cause."

For authorities announcing and giving illustrations of the application of the trite principle thus declared, see:

Ingram vs. State, 124 Ga., 448-452.
Vela vs. State, 49, Tex. Crim., 588.

Allen vs. State, 52 Fla., 1, 3.
Jones vs. State, 12 So., 274; 97 Ala., 77.
Com. vs. Fitzpatrick, 121 Pa. St., 109, 116.
State vs. Nelson, 19 R. I., 467-469.
State vs. Reed, 168 Ind., 588-590.
People vs. Gardner, 62 Mich., 307, 311-312.

The Constitution of the United States, and of the several states, as well as the fundamental principles of the common law, deny the right to vex and oppress a defendant with a second prosecution under either of the conditions above discussed, while a defendant in a civil suit is without the pale of legal protection, under identically analogous conditions, thus demonstrating that the underlying principles upon which the doctrine of *res judicata* is founded is wholly variant from the liberal, humane reasons upon which the defenses of *autrefois convict*, *autrefois acquit* and *second jeopardy* rest.

Moreover, the court in a civil action possesses practically unlimited discretion to set aside a verdict for either party, while a verdict of acquittal in a criminal case is final and beyond the power of judicial annulment.

For these and other cognate reasons, it must be evident that the rules determinative of a plea of *res judicata*, in a civil action, furnish no test to ascertain the efficacy of pleas of former acquittal, and the like, in a criminal suit.

We will here bring our labors to a close.

Possibly no argument in support of the plea of *autrefois acquit* was necessary. The force of the maxim, *absoluta sententia expositore non indiget* sufficing to dispense therewith, but we have felt it safer to be guided by the wisdom embodied in the adage "abundant caution does no harm."

The repose of society—the preservation of one of the most valued safeguards of the citizen against oppression by those wielding the powers of government—demand that whatever has been definitely determined by a competent tribunal shall be accepted as irrefutable legal truth; nothing can add strength to its verity, and no argument can detract from its legal potency.

The liberty-loving instincts of the Anglo-Saxon race—the dictates of justice—the teachings of the sages of the

law, and the spirit, if not the letter, of the Constitution, all concur in denouncing the effort to subject these defendants, after due acquittal, to a second trial upon a grave criminal charge.

We firmly believe that such unjust, oppressive ordeal will not be tolerated in this tribunal.

In conclusion, we submit that it logically follows from the legal principles presented and discussed herein, that the proper disposition to be made of the pending writ of error should be either the dismissal thereof for want of jurisdiction, or affirmance of the judgment of the lower court upon the pleas in bar.

Respectfully submitted,

REESE McCLOSKEY,
N. W. DIXON,
Attorneys for Defendants.

JOHN M. WALDRON,
Special Counsel.

# In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN error,
*v.*
WILLIAM R. MASON AND JOSEPH Vanderweide.
} No. 642.

**MOTION TO ADVANCE.**

The defendants in error were indicted in the District Court of the United States for the District of Colorado at the November term, 1907, for conspiring, in violation of section 5509 of the Revised Statutes, to deprive Joseph A. Walker and certain other persons, special agent and employees, respectively, of the Department of Justice, of "a right and privilege, and the free exercise thereof secured to them, and each of them, as citizens of the United States by the Constitution and laws of the United States, to investigate, discover, inform of, and report all violations of the laws of the United States and evidence thereof concerning and in the matter of the fraudulent and unlawful entry of public coal lands and other public lands of the United States within the said district of Colorado," by making an assault with

intent to kill upon the said Walker on November 3, 1907, in pursuance of which the said Walker was shot and killed by Vanderweide, the defendant Mason aiding and abetting therein.

To the indictment demurrers were filed and overruled, as also special pleas in bar, on the ground that said defendants had been tried in the state court on the charge of murder growing out of the same transaction, and were acquitted therein. These pleas in bar were sustained by the court and the portions of the three counts of the indictment charging the defendants with a violation of section 5509 in the matter of the alleged murder of Joseph A. Walker were quashed, and the defendants discharged. From the judgment of the court sustaining the special pleas in bar and quashing the indictment a writ of error was sued out by the United States under the criminal appeals act of March 2, 1907 (34 Stat., 1246).

In accordance with the provisions of that act giving cases of this kind "precedence over all other cases," the Solicitor-General moves the court to advance the case on the docket and set it down for hearing on such day during the present term as may be convenient to the court.

Opposing counsel concur in this motion.

HENRY M. HOYT,
*Solicitor-General.*

JANUARY, 1909.

As the Federal court accepts the judgment of a state court construing the meaning and scope of a state enactment, whether civil or criminal, it should also accept the judgment of a state court based on the verdict of acquittal of a crime against the State.

THE facts, which involve the construction of §§ 5508 and 5509, Rev. Stat., are stated in the opinion.

*Mr. Assistant Attorney General Fowler*, for plaintiff in error:

The facts presented in the special plea do not bring the case within the second jeopardy provision of the Fifth Amendment. This provision applies only to proceedings in United States courts. The first ten Amendments operate on the National Government alone. *Barron* v. *Baltimore*, 7 Pet. 242, 246; *Livingston* v. *Moore*, 7 Pet. 468, 551; *Fox* v. *Ohio*, 5 How. 410, 434; *Smith* v. *Maryland*, 18 How. 71, 76; *Withers* v. *Buckley*, 20 How. 84, 91; *Pervear* v. *The Commonwealth*, 5 Wall. 475, 479; *Twitchell* v. *The Commonwealth*, 7 Wall. 321, 325; *The Justices* v. *Murray*, 9 Wall. 274, 278; *Edwards* v. *Elliott*, 21 Wall. 532, 557; *Walker* v. *Sauvinet*, 92 U. S. 90, 92, *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Pearson* v. *Yewdall*, 95 U. S. 294, 296; *Davidson* v. *New Orleans*, 96 U. S. 97, 101; *Kelly* v. *Pittsburg*, 104 U. S. 78, 79; *Presser* v. *Illinois*, 116 U. S. 252, 265; *Spies* v. *Illinois*, 123 U. S. 131, 166; *Brown* v. *New Jersey*, 175 U. S. 162, 174; *Barrington* v. *Missouri*, 205 U. S. 486; *Hunter* v. *Pittsburg*, 207 U. S. 176.

The fact that this case is pending in a Federal court does not make the provision applicable, as the pleas do not set up a former jeopardy within the meaning of the Constitution. The legislative and judicial acts of the state governments are entirely distinct from similar acts of the National Government, and this Amendment does not apply to any proceeding in a state court. *Barron* v. *Baltimore*, 7 Pet. 242, 246. See also *Fox* v. *Ohio*, 5 How. 410, 434; *United States* v. *Barnhart*, 22 Fed. Rep. 285, 290; 12 Cyc. Law and Pro. 259.

The same act may constitute an offense against both the national and state governments and the trial of one offense is

not a bar to the trial of the other. *Fox* v. *Ohio*, 5 How. 410, 434, *Moore* v. *People of Illinois*, 14 How. 13, 19; *United States* v. *Cruikshank*, 92 U. S. 542, 550; *Coleman* v. *Tennessee*, 97 U. S. 509, 518; *Ex parte Siebold*, 100 U. S. 371, 390; *Cross* v. *North Carolina*, 132 U. S. 131, 139; *Pettibone* v. *United States*, 148 U. S. 197, 209; *Crossley* v. *California*, 168 U. S. 640, 641; *Grafton* v. *United States*, 206 U. S. 333, 353; *Sexton* v. *California*, 189 U. S. 319.

The offense with which defendants are charged does not arise out of the same acts as, and is entirely different in its nature from, the offense for which they were tried in the state court.

Defendants are not in this case indicted for the murder of Walker, but for a conspiracy to injure and intimidate and oppress Walker and others in the exercise of certain privileges secured to them by the Constitution and laws of the United States. The gravamen of the offense here charged is the conspiracy. Rev. Stat., § 5509, does not create a separate offense, but it only prescribes the punishment that may be inflicted in case it be determined by the jury that the aggravated conditions mentioned therein existed. As to the relationship between § 5508 and § 5509 and the object of the latter section, see *Davis* v. *United States*, 107 Fed. Rep. 755. See also *Rakes* v. *United States*, 212 U. S. 55; *Motes* v. *United States*, 178 U. S. 462.

*Mr. John M. Waldron*, with whom *Mr. Reese McCloskey* and *Mr. N. W. Dixon* were on the brief, for defendants in error:

The spirit, if not the letter, of the second jeopardy clause of the Fifth Amendment inhibits a retrial in the Federal court of the murder charge contained in the indictment. Constitutional provisions for the protection of person and property should be liberally construed. *Boyd* v. *United States*, 116 U. S. 635; *Ex parte Lange*, 18 Wall. 163, 205.

For cases holding, on a similar state of facts, that the right of retrial herein does not exist, see *Houston* v. *Moore*, 5 Wheat. 1; *United States* v. *Pirates*, 5 Wheat. 184, 197. See also 1 Kent's

Commentaries, 188; 1 Bishop's Crim. Law (6th Ed.), §§ 985, 984, 1060; 1 Wharton's Crim. Law, § 293; *In re Stubbs*, 133 Fed. Rep. 1012.

There are several decisions of the state supreme courts which refuse to recognize a concurrent jurisdiction. The bare possibility of a second prosecution for the same alleged criminal act is abhorrent to the principles of the common law, as well as the genius and spirit of American jurisprudence, and dual jurisdiction of state and Federal government to create offenses against each out of one act should be denied. See *Commonwealth* v. *Ketner*, 92 Pa. St. 372, 377; *Com.* v. *Fuller*, 8 Metcalf, 313 (Mass.); *Harlan* v. *People*, 1 Douglas' Reports (Mich.), 212.

These constitutional provisions here relied on are, in effect, but declaratory of the maxims and principles of the common law, and the humane principles represented thereby should be applied and enforced by the Federal courts, even though the Federal Constitution was silent upon the subject. *Ex parte Lange*, 18 Wall. 163–205; see also *State* v. *Cooper*, 1 Green (N. J.), 375; 1 Chitty's Crim. Law, §§ 452–462.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a criminal prosecution under §§ 5508 and 5509 of the Revised Statutes. The substantial provisions of each of those sections were reproduced from the act of May 31st, 1870, c. 114, passed for the purpose of enforcing the right of citizens to vote in the several States, and for other purposes.

Those sections are as follows: "§ 5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not

more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States. § 5509. If, in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed." Section 5507 prescribes a different offense from that specified in § 5508, has no bearing on the present case, and need not therefore be given here.

The first count of the indictment—stating it generally—charged the defendants with an unlawful, malicious and felonious conspiracy to injure, oppress, threaten and intimidate certain named persons, citizens of the United States, in the free exercise and enjoyment of a right and privilege secured to them and to each of them by the Constitution and laws of the United States, in this, that the said conspirators injured, oppressed, threatened and intimidated those citizens, in the free exercise and enjoyment of their right and privilege as special agents and employés of the Department of Justice and as citizens and agents of the United States, to investigate, discover, inform of, and report to the proper officer all violations of the laws of the United States and the evidence relating thereto, in the matter of the fraudulent and unlawful entry of coal and other public lands of the United States in Colorado, theretofore subject to entry under the laws of the United States. It was further charged in the same count that in pursuance of such unlawful and felonious conspiracy *and to effect the object thereof*, the defendants, within the District of Colorado, did kill and murder one Joseph A. Walker.

The second count differs from the first only in the particular that it charges that the alleged conspiracy and murder was because of the persons against whom the conspiracy was formed *having freely exercised* the right and privilege specified in the first count

The third count charges substantially the commission of the same offense of conspiracy and murder, because of the exercise by the citizens named of the right and privilege secured to them by the Constitution and laws of the United States to accept public employment from and to enter the service of the United States as officers, agents and employés, and to be secure in their persons from bodily harm, injury and cruelties, while discharging the duties belonging to them as such officers, agents and employés.

It was stipulated by the parties that the defendants might file a demurrer to the indictment and to each count thereof, as well as "a plea in bar in the nature of a plea of former acquittal" to so much of each count as charged them with the crime of having killed and murdered one Walker, named in the indictment—the stipulation reciting, "said charge of murder being based upon § 5509 of the Revised Statutes, and that the filing of said demurrer shall be without prejudice, in any respect, to the said plea, and likewise the said plea shall be without prejudice, in any respect, to the said demurrer."

The court made an order of record recognizing and giving effect to the above stipulation. The defendants filed a joint and several demurrer assailing the sufficiency of each count of the indictment. In view of the state of the record and of the conclusions reached by the court we need not set out at large the various grounds of that demurrer.

The defendants filed special pleas in bar of so much of each count of the indictment as charged that the defendants, *in the act of* violating § 5508, killed and murdered Walker for the purpose of giving effect to the alleged conspiracy. To each special plea the Government filed a demurrer.

The special pleas charged in substance that theretofore, in a named court of Colorado, the defendants were charged with the commission of the same murder as that referred to in the indictment herein; that they were arrested and tried in that court (which had full jurisdiction to try the offense charged) and were duly and regularly acquitted of the above charge

of murder and discharged from custody. This acquittal was pleaded as a bar to so much of the indictment in the present conspiracy case in the Federal court as sought to enforce, notwithstanding the acquittal of the defendants in the state court, the provisions of § 5509 of the Revised Statutes.

The court below overruled the demurrer to the indictment and adjudged each plea in bar to be sufficient. The Government electing to stand by its demurrer to the special pleas, the Circuit Court of the United States, by an order to that effect, discharged the defendants from that part of each count in the indictment which related to the charge of their having murdered Walker, in violation of the laws of the State, in the act of committing the alleged conspiracy in violation of the statute of the United States.

The United States thereupon prosecuted the present writ of error under the act of March 2, 1907, c. 2564, authorizing the United States to prosecute writs of error in criminal cases on certain points. That act is as follows: "That a writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. *From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.* The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recogni-

zance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant." 34 Stat. 1246.

Only that part of the above act of March 2, 1907, is applicable to the present case which authorizes a writ of error by the United States "from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." In reviewing that decision may we go beyond the ruling in the court below on the special pleas in bar and consider the various grounds of demurrer to the indictment? That question is answered in the much-considered case of *United States* v. *Keitel*, decided at the present term, 211 U. S. 370, 398. It was there said: "That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides, contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to reëxamine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

We can then consider, on the present writ of error, only the specific question whether the special pleas in bar were sufficient to exclude inquiry in the Federal court into the facts of the alleged murder of Walker for the purpose of ascertaining the punishment to be inflicted by that court upon the defendants, if it should be found in that court that they had conspired to

injure, oppress, threaten and intimidate the persons named in the indictment in the free exercise and enjoyment of their constitutional rights in violation of the laws of the United States. Previous to the filing of the special pleas the defendants had been legally tried and acquitted in the state court of the charge of having violated the laws of the State in murdering Walker. When, therefore, this case was called for trial in the Federal court and the Government was about to inquire whether the defendants had, in the act of violating the provisions of § 5508, committed the crime of murdering Walker—an offense against the State—the Circuit Court of the United States was confronted with the fact that the defendants had been already acquitted of that charge after a regular trial in the state court.

The question thus presented is within a very narrow compass, and involves an inquiry as to the meaning and scope of § 5509. The conspiracy for which the defendants were indicted was an offense against the laws of the United States. It is none the less so, notwithstanding the requirement in that section as to the punishment to be inflicted upon its appearing that in the act of committing the alleged Federal offense the defendants committed some felony or misdemeanor against the laws of the State. The reference in that section to an offense committed against the State was not for the purpose of restricting or suspending the power of the State to determine whether its laws had been violated and to punish the offender therefor. That reference was for the purpose only of measuring the punishment for the *conspiracy* charged by the United States, upon its being found at the trial in the Federal court that such conspiracy in violation of the Federal statute had been aggravated by the commission of an offense against the State, "an aggravation merely of the substantive offense of conspiracy," not a distinct, separate offense against the United States to be punished by it without reference to the conspiracy charged in the indictment. *Rakes* v. *United States*, 212 U. S. 57; *Davis* v. *United States*, 107 Fed. Rep. 753. Where the commission of a Federal offense is accompanied by an offense committed against the laws of the State,

it is no doubt competent to so measure the punishment for the Federal offense as to make it equal to the punishment prescribed by the State for the crime committed against the State in the act of violating the Federal law. But is § 5509 so worded as to *require* the Federal court, *after* the defendants have been lawfully tried and acquitted as to the identical crime of murder mentioned in the indictment in that court, to enter upon a judicial investigation to ascertain whether the defendants committed the alleged crime against the State of the murder mentioned in that indictment? We think not. The murder in question, if committed at all, was, as a distinct offense, a crime only against the State, and after the defendants were acquitted of that crime by the only tribunal that had jurisdiction of it *as an offense against the State*, it is to be taken that no such crime of murder as charged in the indictment was in fact committed by them. If this be not so, it follows that, notwithstanding the lawful acquittal of the defendants by the only tribunal that could lawfully try them for the alleged offense against the State, the United States may, in this case, in the Circuit Court of the United States, punish them *for the conspiracy charged*, precisely as the state court could have punished them for murder if the defendants had been previously found guilty of that crime in the state court. We do not think that § 5509 is necessarily to be so construed. Nor do we think that Congress intended any such result to occur. Such a result should be avoided if it be possible to do so. We hold that it can be avoided without doing violence to the words of the statute. The language of that section is entirely satisfied and the ends of justice met if the statute is construed as *not* embracing, nor intended to embrace, any felony or misdemeanor against *the State* of which, *prior to the trial in the Federal court of the Federal offense charged*, the defendants had been lawfully acquitted of the alleged state offense by a state court having full jurisdiction in the premises. This interpretation recognizes the power of the State, by its own tribunals, to try offenses against its laws and to acquit or punish the alleged offender, as the facts may justify.

In this connection it has been suggested that the State might, under this interpretation, defeat the full operation of the act of Congress. Not at all. The interpretation we have given to § 5509 will not prevent the trial of the defendants upon the charge of conspiracy and their punishment, if guilty, according to § 5508, namely, by a fine not exceeding five thousand dollars and imprisonment not more than ten years. The only result of the views we have expressed is that in the trial of this case in the Federal court § 5509 cannot be applied, because it has been judicially ascertained and determined by a tribunal of competent jurisdiction—the only one that could finally determine the question—that the defendants did not murder Walker. The Federal court may proceed as indicated in § 5508, without reference to § 5509. The lawful acquittal of the defendants of the charge of murder makes § 5509 inapplicable in the present trial for conspiracy in the Federal court. In other words, the Federal court may proceed—the defendants having been lawfully acquitted in the state court of the crime of murdering Walker—just as if no such crime was committed or alleged to have been committed by them in the act of violating the provisions of § 5508. As a general rule, the Federal courts accept the judgment of the state court as to the meaning and scope of a state enactment, whether civil or criminal. Much more should the Federal court accept the judgment of a state court based upon a verdict of acquittal of a crime *against the State*, whenever, in a case in the Federal court, it becomes material to inquire whether that particular crime against the State was committed by the defendants on trial in the Federal court for an offense against the United States.

It should be said that the record discloses nothing that impeaches the good faith of the state court in its trial of these defendants on the charge of having murdered Walker. There is nothing to show, if that be material, that the trial in the state court was hastened or wrongly conducted in order that it might have effect upon the trial for conspiracy in the Federal court.